Overcoming the crisis mode

Myrthe Wijnkoop
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In Search of Control
The Netherlands Country Report

Clingendael
Netherlands Institute of International Relations

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About the Project

In December 2022, the Dutch government initiated a working group focussing on the 'fundamental reorientation of the current asylum policy and design of the asylum system.' Its aim is to further structure the asylum migration process, to prevent and/or limit irregular arrivals, and to strengthen public support for migration. One of the assumptions is that the externalisation of the asylum procedure could be a feasible policy option through effective procedural cooperation, with a country outside the EU, that 'passes the legal test'. In other words, if it would be operationalized in conformity with (international) legal standards and human rights obligations. In that context, the working group expressed the need for more insight on how governments with other legal frameworks than the Netherlands, as an EU Member State, deal with the issue of access to asylum, either territorial or extra-territorial, in order to provide thoughts or angles for evidence-based policy choices by the Dutch government, at national and/or European level.

The purpose of this comparative research project, led by the Clingendael Institute, was to collect existing knowledge about the asylum systems of Australia, Canada, Denmark, the Netherlands, and the United States, and to complement this with an analysis of national legislation, policy, and implementation practices, focussing on access to (extra-)territorial asylum. While there are overlaps, each of the asylum and refugee protection systems in the research project operates in very different geographical situations and political contexts.

Beyond the five country case studies, a separate synthesis report that is based on a comparative analysis of the respective legal frameworks and the asylum systems of those countries addresses directions for Dutch courses of action. The synthesis report and the country case studies can be accessed here.

The main question to be answered in the national reports is: *Which instruments are applied or proposed by Australia, Canada, Denmark, the Netherlands and the United States concerning or affecting access to asylum procedures and humanitarian protection*

Therefore, the country research focuses on several central elements of the national asylum systems, including their access to, and implementation of, interdiction practices, border and asylum procedures and other legal pathways. These were put in a broader public, political and legal context, taking into account the countries' national policy aims and objectives.

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Introduction

In December 2022, the Dutch government announced the start of a trajectory for the 'fundamental reorientation of the current asylum policy and design of the asylum system.' Its aim is to further structure the asylum migration process, to prevent and/or limit irregular arrivals, and to strengthen societal support for migration.[1] In light of these aims, political and public discussions about the possibilities for the 'externalisation' of the asylum procedure are ongoing, based on the assumption that these will be reached through effective procedural cooperation with a country outside the EU that 'passes the legal test'.[2]

The purpose of this comparative research project is to collect existing knowledge about selected countries (The Netherlands within the EU, Denmark within the EU with an opt-out, the United States, Canada, and Australia) and to complement this with an analysis of national legislation, policy, and implementation practices, focusing on (extra-)territorial asylum. The results of the country studies will be assembled in a synthesis report with options for Dutch courses of action based on a comparative analysis of applied legal frameworks and the asylum systems of the five countries.

The legal framework applicable to the Netherlands, as well as its national policy and practice with respect to access to (extra)territorial asylum will be the starting point or 'base line' for the comparative analysis. Although the Dutch context is of course well known to the primary interested parties, we still included it for the purpose of comparison and because this research project, with its findings and conclusions, may be of interest to other (EU Member) States. For this reason, we will follow the same outline as applied to the other researched countries, aiming to provide insight into how the Netherlands manages access to its asylum system to third country national asylum seekers.

The main focus point of this report will be the applicable legal framework, including the EU asylum acquis, the Luxembourg court rulings and the interpretation of the ECHR obligations as interpreted by the Strasbourg

1 Parliamentary Documents, *Kamerstukken II*, 19637, no. 3053, 23 December 2022, p. 2.

2 Rijksoverheid, "Bijlage 15 BWO Presentatie deelsessie Asiel," 17 February 2023, p. 13.

jurisprudence. Secondly, it will focus on the particularities of the Dutch asylum system within that legal framework, and the extent to which the Netherlands differs from other EU Member States when dealing with access to asylum, including the impact thereof.

The first paragraph will set out the scene on relevant development on asylum in both the Netherland and the EU. In the second paragraph the applicable international legal framework will be briefly assessed, followed by border management (3) and asylum systems (4) from a Dutch and EU perspective. Paragraph 5 will discuss the issue of externalization of asylum procedures. In paragraph 6 some remarks will follow on return in relation to migration cooperation, followed by statistical information (7) and a conclusion.

1 Setting the scene: general background and relevant developments

Aliens Act 2000 and Tampere 1999: new asylum systems

In the late nineties, the Netherlands adopted a new legal framework on asylum and migration: the Aliens Act 2000.[3] Rather than to change the whole migration system, the focus of the new legislation was to modernise the national asylum procedure, taking into account the experiences of the nineties (high number of asylum seekers from i.a. the Balkan, shortages of reception and shelter and enormous backlogs in the procedures).[4]

Main aims of the Aliens Act 2000 were (1) to simplify the asylum system, with less variation in permits (a single-status system) and less administrative burden; (2) to fasten, shorten and reduce the number of procedures in first and second instance (introduction of an 48-hours procedure and a normal procedure); and last but not least, (3) to enable the procedure to result in either legal stay in the Netherlands or return to the country of origin (or elsewhere).[5]

Around the same time, EU Member States (MS), including the Netherlands, agreed to develop a Common European Asylum System (CEAS) at a Council meeting in Tampere, Finland, in 1999. The main objective was to harmonise national asylum systems (procedure, qualification for (temporary) protection, reception, and return) through common minimum standards, and to allocate responsibility for the processing of asylum applications, the so-called Dublin system. The general aim of the harmonisation was twofold: first, to improve existing asylum systems and provide a higher level of protection, and second,

3 Vreemdelingenwet 2000, Aliens Act 2000.

4 Parliamentary documents, *Kamerstukken II*, 26732, no. 3, 22 September 1999; See also WODC, "Evaluatie Vreemdelingenwet 2000: Achtergrond en opdracht," 2006, p. 33 ff.

5 Ibid.

to prevent asylum 'shopping' by creating a more equal level playing field among EU MS.[6]

It is beyond the scope of this report to provide for an in-depth and complete overview of almost twenty-five years of CEAS developments.[7] In short it has been, and still is, a long, politically difficult and legally complicated journey, mainly due to different interests and goals of MS.[8] It took about five years to achieve results on the first-phase instruments with minimum standards,[9] leaving large margins of appreciation for the implementation in each national legal order. As large discrepancies between the various national asylum systems continued to exist, a recast of the legislative instruments proposed by the European Commission started almost immediately after the initial phase.[10] Next to a further definition and renegotiation of the directives, this second phase also focussed on so-called practical cooperation to further the harmonisation of national asylum systems, amongst others to establish EU agencies such as the European Asylum Support Office (EASO, currently the European Union Asylum Agency (EUAA)) and Frontex.[11] With the Lisbon Treaty, the role of the European Court of Justice (CJEU) in interpreting the legal framework became more influential, as not only the highest national courts, but all judiciaries were able to refer legal questions to the CJEU.[12] At the same time, the EU Fundamental Rights Charter came into force, containing legally binding obligations, including article 18 on the right to asylum.[13] While at a practical level the European cooperation was gaining more ground, the so-called second (legislative) phase of harmonisation became

6 European Council, "Tampere European Council Presidency Conclusions," October 1999; See also: International Association of Refugee Law Judges, *An Introduction to the Common European Asylum System for Courts and Tribunals*, EASO, August 2016, p. 14-15, 22.

7 See for a comprehensive overview: C. Dumbrava, K. Luyten and A. Orav, "EU Pact on Migration and Asylum: State of Play," European Parliamentary Research Service, June 2023.

8 Advisory Committee on International Affairs (AIV), *Het Europese asielbeleid: twee grote akkoorden om de impasse te doorbreken*, 1 December 2020.

9 European Parliamentary Research Service, *Briefing on EU Pact on Migration and Asylum: State of Play*.

10 European Parliamentary Research Service, *Briefing on EU Pact on Migration and Asylum: State of Play*.

11 European Parliamentary Research Service, *Briefing on EU Pact on Migration and Asylum: State of Play*.

12 "Amending the Treaty on European Union and the Treaty establishing the European Community," *OJ C 306*, 17 December 2007.

13 M.E. Wijnkoop, "Zoeken, genieten en/of garanderen. Het recht op asiel nader beschouwd," *A&MR*, no. 7, October 2013, p. 327-336.

somehow a never ending circle of discussions, interrupted by large impact crisis situations such as humanitarian disasters in the Mediterranean.

Since the 2015 “Syria crisis”, the EU got stuck in a political impasse and the prospect of a genuinely harmonised EU asylum system seemed further away than ever.[14] New attempts to deal with asylum migration management were done through setting up new comprehensive policy agendas such as the European Migration Agenda 2015, with short (intra-EU relocation through hotspots procedures in Greece and Italy) and longer term (2016 redraft of the recast of the legislative package) measures.[15] But yet again: the hotspot procedures were criticised[16] and did not prove to be the ultimate blueprint for ‘joint-processing’,[17] relocation was not supported by all MS and appeared to be complicated in the operation,[18] and the negotiations on the legislation got stuck, again. From 2016 onwards the number of asylum applications in the EU decreased significantly. However, secondary movement of asylum seekers within the EU was considered problematic by several MS, including the Netherlands.[19] The differences between national asylum systems remained. The lack of intra-EU solidarity resulted in boats with migrants stuck at sea because MS could not agree on how to deal with the disembarkation and responsibility sharing, Dublin was still failing and ineffective and the humanitarian crisis at the Greek islands remained unsolved. In recent years the number of irregular migratory movements is increasing again.

14 Advisory Council on Migration, “Policy brief EU-Pact Migratie en Asiel: Na woorden nu daden,” 9 November 2020; See also AIV, “Het Europese asielbeleid: twee grote akkoorden om de impasse te doorbreken,” December 2020.

15 European Commission, “COM(2015) 240 final,” 13 May 2015. See also the recast proposals: COM (2016) 270, COM (2016) 271, COM (2016) 272, COM (2016) 465, COM (2016) 466, COM (2016) 467, COM (2016) 468, COM (2018) 634.

16 See for comments for example the European Union Agency for Fundamental Rights (FRA), “Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the ‘hotspots’ set up in Greece and Italy,” March 2019.

17 The follow-up proposals regarding ‘closed centres’ did not get sufficient support either. See: European Commission, “Non-paper on “controlled centres” in the EU-interim framework,” 27 July 2018.

18 Council of the European Union, “Council Decision (EU) 2016/1754,” 29 September 2016; See also Advisory Council on Migration (ACVZ), *Realism about Numerical Targets. Exploring immigration targets and quotas in Dutch policy*, 21 December 2022, p. 129.

19 Ministry of Foreign Affairs, “A renewed European agenda for migration 2019-2024,” March 2019, 2; ACVZ, “Secundaire Migratie,” 5 November 2019.

To prevent CEAS from remaining in vicious political circles and reaching a dead-end, the European Commission initiated new dialogues with MS in order to re-open negotiations. In September 2020 the EU Migration and Asylum Pact was published: an extensive programme with no less than nine proposals, including five legislative proposals.[20] In December 2023 the Council, Commission and European Parliament reached a political agreement on the main aspects such as the border procedures and solidarity mechanisms.[21]

The Netherlands is one of the founding states of the European Community and has been an active Member State ever since. The country has been a strong advocate of European cooperation to tackle the many challenges faced both on the continent and for Europe in the world.[22] The Netherlands has been pushing forward EU harmonisation and cooperation within the field of asylum, considering it the only way to deal effectively with this issue in an EU without internal borders.[23] With respect to asylum procedures, the Netherlands aimed to 'duplicate' its national asylum procedure into the CEAS minimum standards also to refrain from extensive implementation legislation.[24] Examples of Dutch points of interest are the accelerated procedure, border procedures, inadmissibility clauses such as the safe countries concept (including the strive for common EU lists of safe countries), credibility and risk assessments, and strict criteria for subsequent and repeated applications.[25]

External dimension of EU asylum policy and role of the Netherlands

Apart from the internal dimension there have also been developments in the last two decades in the external dimension of the EU asylum and migration policy, which affect the access to asylum. Since the 1990's, European asylum policies and responses to refugee crises have increasingly focused on stemming flows rather than managing them. Visa restrictions, carrier sanctions and cooperation with third countries in border management through the posting of liaison officers abroad, have resulted in a gradual shifting of border controls

20 European Commission, "COM (2020) 609 final," 23 September 2020.

21 European Commission, "Historical Agreement on EU Pact Migration and Asylum," 20 December 2023.

22 Ministry of Justice and Security, *Staat van Migratie 2023*, 6 October 2023.

23 Ministry of Foreign Affairs, "A renewed European agenda".

24 Advisory Council on Migration, "De onvolledige implementatie van Europese Richtlijnen," 10 March 2023, p. 15.

25 Ministry of Foreign Affairs, "A renewed European agenda".

beyond the traditional physical State borders (non-entrée regime) making the journey for protection increasingly perilous and costly.[26] All those measures taken together limit the possibilities to find accessible legal and safe routes to European territory, leading people seeking protection to take irregular routes, putting their lives into the hands of criminal human smuggling networks. Tackling and preventing irregular migration thus became an important pillar of (broader) migration cooperation with countries outside the EU. Agendas and policy frameworks for such migration partnerships have been numerous over the years.[27]

One element of the 'external dimension of EU asylum policy' has also been key to Dutch (foreign) policy efforts, namely the strengthening of refugee protection in the regions of origin. Already in response to the 2003 Blair externalisation proposals, the Netherlands put more emphasis on the idea of 'regional protection' than the proposition of transit processing centers. Like Denmark, the Dutch government has been a frontrunner in promoting and pushing forward multilateral initiatives on asylum capacity building, investing in sustainable livelihoods and durable local integration, amongst other through the development of EU Regional Protection Programmes.[28] Currently, the so-called Prospects-programme forms the cornerstone of the Dutch policy on protection in the region.[29]

26 European Council on Refugee and Exiles (ECRE), *Protection in Europe: Safe and Legal Access Channels*, February 2017.

27 See for example "The EU Global Approach to Migration and Mobility (GAMM)," COM (2011) 743 final, 18 November 2011.

28 Thea Hilhorst et al., "Kennisagenda 2021 - Opvang in de regio," Tweede Kamer, 18 January 2021; ECRE, "EU External Cooperation and Global Responsibility Sharing: Towards an EU Agenda for Refugee Protection," February 2017. See also various Commission documents on past developments: COM(2003) 152, 26 March 2003; COM(2003) 315, 3 June 2003; COM(2004) 410, 4 June 2004; COM(2005) 388, 1 September 2005; COM(2008) 360, 17 June 2008. For a critical note on these Regional Protection Programmes: Aspasia Papadopoulou, "Regional Protection Programme: an effective policy tool?," ECRE, January 2015.

29 Parliamentary documents, *Kamerstukken II*, 35570 XVII, no. 52, 25 January 2021.

These Dutch and EU efforts to strengthen refugee protection in the region should clearly be distinguished from the various externalisation proposals[30] that have been put on the table throughout the years but never materialized.[31] In essence, such proposals postulated that claims for protection should be exclusively processed in centres located outside the European Union, meaning that anyone applying for asylum on the territory of an EU Member State should be returned to one of these centres. The European Commission has always been very clear on the topic-matter: any model of external processing should be *complementary* to the right to asylum in Europe, emphasising the non-refoulement as cornerstone of European values.[32] The Dutch government stated in reaction to the recent motions in the national parliament on externalisation plans that Duitch asylum policy should be in conformity with international legal standards.[33]

Changes in Dutch national asylum law

Since the implementation of the Aliens Act 2000, the national asylum system has been (further) revised on several occasions.[34] In conjunction with the first large revision following a parliamentary motion, a large group of asylum seekers (28.000) who were initially rejected, but remained in the Netherlands for many

30 With 'externalisation of asylum' or 'external asylum processing' is meant any arrangement allowing for the assessment of the merits of asylum application in processing centers outside its own territory (extra-territorial) and subsequently admit only those who are successful, thus excluding the possibility to apply for asylum on the territory. See Advisory Council on Migration Affairs, "External processing," December 2010, at p. 12, a definition is laid down of EU external processing: any arrangement allowing for the exclusive joint assessment of the merits of asylum applications by, or under, the responsibility of the EU or two or more of its Member States in processing centers outside EU territory.

31 See paragraph on 'externalisation' in this report.

32 See also the reluctant response of the European Commission to the Danish new legislation on externalisation: On 18 June 2021 Commissioner Ylva Johansson stated that "*[t]he idea of a transfer of asylum-seekers to third countries for processing and accommodation is contrary to the spirit of the Geneva Convention. A system aiming for external processes outside the EU instead of protecting right to apply for asylum in the EU would send a strong and wrong signal to the outer world: Europe is disengaging. … External processing of asylum claims raises fundamental questions about both access to asylum procedures and effective access to protection. It is not possible under existing EU rules or proposals under the New Pact on Migration and Asylum. The Pact on Migration and Asylum is based on the right to asylum as a fundamental right in the European Union, guaranteed by the EU Charter.*"

33 See paragraph 'externalization' in this report.

34 The first evaluation of the Aliens Act 2000 in 2006 (Commission Scheltema) did not conclude that the procedures were indeed shorter and the quality of the decision making in first instance higher.

years, were regularised in 2007. The main aim of this 'pardon' policy, apart from the humanitarian aspect was to relieve the asylum system of this large burden of caseload, and to move forward with a 'clean slate'.[35] As the return policy did not become more effective in practice, in 2007 a separate governmental organisation was installed to focus solely on the return process: the Return and Repatriation Service (*Dienst Terugkeer en Vertrek* DT&V). Subsequently in 2010 PIVA (Programme implementation improved asylum procedure) was implemented, with five objectives: to further shorten the asylum procedure, provide a higher quality fast procedure, reduce the number of subsequent and/or repeated asylum procedures; reduce the number of asylum seekers who are no longer entitled to reception, and thus left undocumented in the municipalities and increase the return of rejected asylum seekers.[36]

This programme was almost immediately followed by the next in 2011: Programme streamlining asylum procedures (PST)[37] which included a recast of protection grounds. [38] Originally article 29 of the Aliens Act entailed four separate protection grounds: (a) refugee convention status; (b) subsidiary protection[39]; (c) exposure to a traumatic experience; and (d) categorial group based protection (a form of prima facie protection based on the general situation in a certain country or part of that country). In this recast, (c) and (d), the grounds for protection based on national legislation, were deleted, (a) and (b), the 'international' grounds, remained. The main argument of the government was that the protection system would thus be more aligned with the EU acquis. As also followed from the CJEU Elgafaij case,[40] subsidiary protection ex article 15 Qualification Directive (QD) would be granting protection to persons facing a real risk of suffering serious harm also from generalized armed violence, making categorial protection obsolete. The c-ground would be considered under regular

35 De *Regeling ter afwikkeling nalatenschap oude Vreemdelingenwet (RANOV)* entered into force 15 June 2007.

36 Parliamentary documents, *Kamerstukken II*, 29 344, no. 67, 24 June 2008. See also WODC, "Eindrapport evaluatie herziene asielprocedure," September 2014.

37 Parliamentary documents, *Kamerstukken II*, 19637, no. 1597, 21 December 2012.

38 The process of this deletion of protection grounds took several years and received many critical comments from experts and refugee organization as reasons of limiting protection space. The legislative proposal also included changes in the family reunification procedure. See Parliamentary documents, *Kamerstukken II* 33923, no. 1 and ff. The amended legislation was published on 24 December 2013 and entered into force on 1 January 2014.

39 Based on article 2 and 3 of the ECHR, and article 15 Qualification Directive ('serious harm').

40 CJEU, *Elgafaji v. The Netherlands*, C465/07, 17 February 2009.

permit for humanitarian reasons.[41] Furthermore the PST programme focussed, among others, on improving the initial stages of the procedure for example whereby all relevant circumstances of the case should be considered at the earliest opportunity in the procedure.[42]

After the 2015 increase of asylum applications (from 27.000 in 2014 to 54.000 in 2015), the so-called 'tracks' policy was implemented with the official aim to shorten the waiting time for asylum seekers and increasing the efficiency of the process. In practice most efforts were focused on the Dublin track and the manifestly unfounded track, and not on manifestly well-founded, which indeed meant that Syrians asylum seekers who were in general eligible for subsidiary protection had to wait a very long time before their claim was assessed.[43]

Since 2016, the number of asylum applications in the Netherlands decreased, as everywhere else in the EU. Based on political and financial considerations, reception centres were closed and the relevant operational services had to deal with cuts, resulting in backlogs, huge capacity problems and a reception crisis.[44] After many internal and external investigations and reports into the functioning of the asylum services,[45] extra financial support has been provided to the operational actors in the asylum system.[46]

However, thus far, and meanwhile also accompanied by the increase in the numbers of asylum applications since 2022, this has not led to solving the backlogs in assessing asylum claims nor the reception crises, whereby the government is also depending on municipalities for actual accommodation

41 As a result of a parliamentary motion this ground for protection was again included under subsidiary protection, article 29(b) Aliens Act. See also article C1/3.3 Aliens Circular 2000.

42 Anita Böcker et al., *Eindrapport evaluatie herziene asielprocedure*, WODC, December 2014.

43 See further the paragraph on national asylum process in this report.

44 ACVZ, *Peaks and Troughs. Towards a sustainable system for the reception of asylum seekers and the housing and integration of asylum residence permit holders*, (executive summary) 23 July 2017.

45 See amongst others: Significant Public, "Doorlooptijden IND: Definitieve rapportage," February 2020; EY, "Eindrapportage doorlichting IND. Verbetermogelijkheid IND met aandacht voor het asielproces," 20 May 2021; EY, "Eindrapportage doorlichting Vreemdelingenketen: Verbetermogelijkheden ter bevordering van effectiviteit en efficiëntie van de Vreemdelingenketen," 20 May 2021.

46 Ministry of Finance, Financieel Jaarverslag Justitie en Veiligheid 2021.

locations.[47] Not all municipalities are very keen to provide for such locations for a variety of reasons: lack of local political and public support, little or no trust in the central government due to past experiences (for example when a location had to close suddenly notwithstanding running agreements), differences of opinion about the scale of the centres (smaller receptions centres are often preferred by municipalities, but have a different cost-benefit ratio).[48] On the 1st of October 2023, there was a reception shortage of almost 21.000,[49] necessitating the Central Agency for Asylum reception (COA) to call for urgent action as the central registration centre in Ter Apel was overrun again because asylum seekers could not be transferred to reception locations.[50] The reception crisis is further exacerbated and complicated by the task of municipalities to provide for accommodation of displaced Ukrainians under the Temporary Protection Directive. Since February 2022, more than 100.000 displaced Ukrainians have been registered in the Netherlands, of which almost 84.000 also received accommodation under the responsibility of the municipalities, thus creating a tension between demand and supply.[51] Certain municipalities (local government and city councils) tend to be more positive towards receiving displaced Ukrainians than to opening a 'regular' asylum reception centre.[52]

Relation between asylum and labour (migration)

Traditionally the Dutch migration policy has upheld and maintained a strict distinction between asylum and other (regular) migration, such as labour migration. It is for example impossible to 'switch lanes' with respect to the grounds for a legal stay without significant consequences such as returning to the country of origin to apply for a work visa before allowing to work in the

47 ACVZ and Raad voor het Openbaar Bestuur, "Opvang uit de crisis," June 2022; Dutch Council for Refugees (DCR), "Derde quickscan noodopvang," October 2022; DCR, "Wegkijken en vooruitschuiven," June 2023. See also news reports on the website of the Central Agency for the reception of asylum seekers (COA).

48 Ibid. See also Gert Janssen, "Burgemeesters tegen COA: stop met 'overvaltactiek' voor asielopvang in hotels," *NOS*, 14 December 2022.

49 Almost 71.000 places are needed, and less than 50.000 available, see: COA, "Capaciteit en bezetting," November 2023.

50 See news reports on the COA website.

51 Central Government information, "Reception and protection Ukrainian displaced in numbers," accessed on 6 November 2023.

52 National Human Rights Institute (College voor de Rechten van de Mens): "Municipalities which only want to accommodate Ukrainian displaced are acting discriminatory", 29 June 2022.

Netherlands.[53] Until recently asylum seekers are only allowed to work for a maximum of 24 weeks per year.

Recently this distinction seems to become less strict. There has been a slight economic growth since the 2020 pandemic, with a moderate 0.9% growth projected for 2023, rising to 1.4% in 2024.[54] The Netherlands has been struggling with labour market shortages since mid-2021,[55] with a relatively low unemployment rate of 3.7% in September 2023 and an expectation of a need of labour force in an ageing society. This has raised the question whether one could also make better 'use' of asylum seekers and their employability, talent, experiences, and skills.[56] Moreover, research has shown that longstanding inactivity has severe consequences for the wellbeing, mental health and longer-term integration prospects of asylum seekers.[57]

Unlike asylum seekers, displaced Ukrainians do have the right to work (without a separate work permit) under the temporary protection scheme.[58] It will be interesting to see what lessons can be learned and whether this might lead to a 'paradigm change' with respect to asylum and access to the labour market.[59] Due account has to be taken of the fact that the current economic climate is indeed stimulating in the sense that there is great need for labour force. It is also likely that employers are somewhat more inclined to hire the European Ukrainians. In September 2023, 50% of the 68,000 Ukrainian refugees in the Netherlands was employed. However, most are employed parttime, and a

53 See the systematic division between chapters within the Aliens Act 2000 ('regular' and 'asylum' permit). See also ABRvS, 201004851/1/V2, 18 October 2010, JV 2010/470.

54 OECD, "Economic Survey of the Netherlands," (executive summary) June 2023, p. 3. Rising inflation has been an ongoing challenge in response to the COVID-19 pandemic and the war on Ukraine, hitting its peak in +14.5% in September in 2022. A downward trend has been recently observed, measured at -0.4% in October 2023. See Central Statistical Office (Centraal Bureau voor de Statistiek CBS), "Dashboard economie."

55 CBS, "Spanning op de arbeidsmarkt."

56 ACVZ, "From asylum seeker to healthcare provider," (summary), 11 May 2021.

57 Ibid. See also for example Godfried Engbersen et al., *Geen tijd te verliezen: van opvang naar integratie van asielmigranten*, Scientific Council for Governmental Policy (Wetenschappelijke Raad voor Regeringsbeleid (WRR)), Policy-brief 4, 2015.

58 IND, "Richtlijn Tijdelijke Bescherming Oekraïne," October 2023.

59 The WODC is currently conducting longitudinal research with respect to the reception and residence of Ukrainian displaced in the Netherlands: See for more information: WODC, "Longitudinaal Onderzoek Cohort Oekraïense Vluchtelingen (LOCOV)."

majority works in the corporate service industry. A recent study concluded that only 30% of the 900 interviewed Ukrainian refugees is satisfied with their job in the Netherlands, with many others struggling to find work in their field and at their level.[60] Of additional concern is the possible exploitation of Ukrainian refugees. In March 2023, FairWork reported an increase in registered cases of labour exploitation.[61] An increase in Ukrainian victims of human trafficking was furthermore reported, raising from 7 in 2021 to 51 in 2022, almost all of which involved cases of labour exploitation.[62]

Currently, asylum seekers in the Netherlands may work when their asylum application has been pending for at least six months and no final decision has thus far been made. The Cabinet's main point is that employment in the Netherlands should not hinder the possible return to the country of origin.[63] Up until November 2023, Article 11 of the Foreign Nationals Employment Act (*Wet Arbeid Vreemdelingen* WAV) held that asylum seekers were not allowed to receive a temporary work permit for more than 24 weeks a year, to prevent asylum seekers gaining a right to unemployment benefits.[64]

Recently, a shift occurred in response to a legal case initiated in March 2023 against the Netherlands challenging the 24-week rule. The case was brought forth by an asylum seeker from Nigeria, prompting a reconsideration of the existing policy. In April 2023, the Court ruled that the Employee Insurance Administration (*Uitvoeringsinstituut Werknemersverzekeringen*, UWV), may no longer refuse an employer a work permit for an asylum seeker if, as a result, the 24-week time-limit is exceeded,[65] but the UWV appealed the matter to the Council of State for a final ruling.[66] On the 29th November 2023, the Council of State's final conclusion was that the previous Court's ruling must be upheld,

60 Hogeschool InHolland, "Oekraïense vluchtelingen en hun toegang tot basisvoorzieningen," October 2023.

61 FairWork, "Oekraïense vluchtelingen benadeeld en uitgebuit in Nederland," 22 March 2023.

62 Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *Jaarcijfers Mensenhandel 2022*, 18 October 2023, p. 5.

63 Ministry of Social Affairs, "Advies verenigbaarheid 24-weken-eis met de Opvangrichtlijn," 10 December 2021.

64 Wettenbank, "Wet arbeid vreemdelingen," 1 January 2023.

65 De Rechtspraak, "Rechtbank oordeelt dat de wetbeperking van 24 weken voor asielzoekers in strijd is met Europees recht," 18 April 2023.

66 Omroep Gelderland, "Mogen Asielzoekers langer werken? Elvis uit Harderwijk vindt van wel," 7 September 2023.

stating that the 24-week rule disproportionately hinders access to the labour market for asylum seekers.[67] The UWV proclaimed it would adjust the 24 week work permits and the outgoing Government said it would adopt the rules.[68] This adoption brings Dutch policy in line with the EU Reception Directive.[69]

Political and public debate: urge to 'take (more) control' of migration

Migration is the main cause of population growth, with an increase of more than 220.000 in 2022, also due to the arrival of around 87.000 displaced Ukrainians last year.[70] In general, more than half of the migrants arriving in the Netherland originates from within the EU and the European Free Trade Association (EFTA).[71]

Migration, and asylum in particular, has always been a contentious issue in Dutch politics. More recently however, this seems to be even more the case, fuelled by an 44% increase in the number of first asylum applications (35.500) in the Netherlands in 2022 compared to 2021,[72] a national 'crisis-mode' due to shortage of reception and backlogs, and constant messaging of seemingly uncontrollable, irregular arrivals of (asylum)migrants at the external EU borders.[73] In that context the governmental working group on the fundamental reorientation of the asylum system has been initiated.[74] Meanwhile the political debate over the last year has been intensified with various outcries for urgent measures such as increasing internal border controls and reopening the debate on externalisation of asylum procedures.[75]

67 NU, "Asielzoeker mag langer werken: hoogste rechter haalt streep door '24 wekeneis'," 29 November 2023.

68 José Boon, "Kabinet grijpt direct in na uitspraak rechter: asielzoekers mogen hele jaar werken," *NU*, 29 November 2023.

69 José Boon, "Kabinet grijpt direct in na uitspraak rechter: asielzoekers mogen hele jaar werken," *NU*, 29 November 2023.

70 CBS, "How many people immigrate to the Netherlands?," accessed on 6 November 2023.

71 Parliamentary documents, *Kamerstukken II*, 364120, no. 1, 19 September 2023.

72 IND, "Asylum Trends," January 2023.

73 See paragraph 'setting the scene' in this report: Administrative capacity is a big problem in the Netherlands, partly due to governmental budget cuts in all parts of the asylum system and a lack of a buffer to process larger numbers of refugees in times of crisis.

74 See the introduction of this report.

75 See paragraph 'externalisation' in this report.

In July 2023, the Dutch government stepped down as the coalition parties could not reach agreement on further family reunification restrictions of holders of international protection in an effort to decrease the number of asylum applications. The fact that this topic led to the fall of the government shows the politicisation of asylum migration in the national public debate, as the impact in decreasing actual numbers due to this particular measures would be relatively small.

Migration was one of the most important topics in the campaign in the run up to the recent November 2023 general elections.[76] Public opinion polls indicated that Dutch citizens think the elections should primarily address inflation (34%), health care (28%), asylum and integration (27%), the housing market (27%) and climate (21%). Immigration and asylum are mostly important issues for the right-wing electorate (44%), while the left wing does not consider it a priority (13%).[77] Overall, the Dutch population has become more negative towards the arrival of (asylum)migrants, expressing serious concerns over the impact of migration on Dutch society and welfare state.[78] These concerns have been translated in the result of the election, whereby the Freedom Party (PVV) of far right politician Wilders became by far the largest party in parliament, gaining the right to initiate the coalition negotiations. The PVV has a clear anti-immigration agenda, and the current state of play is that a coalition government with other (right-wing) parties with a strong focus on migration control, preventing access to asylum and lowering the number of asylum seekers will likely be negotiated in the coming months.

76 NOS, "Peilingwijzer: VVD, NSC en GL/PvdA houden elkaar in evenwicht," 26 October 2023.

77 Sjoerd van Heck, "Politieke barometer week 39," Ipsos, 27 September 2023; Politieke Barometer on X, 2 October 2023.

78 Bram Geurkink, Emily Miltenbrug en Josje den Ridder, "Burgerperspectieven 2023 Extra Verkiezingsbericht," Sociaal en Cultureel Planbureau (SCP), 24 October 2023, p. 16.

2 International legal framework

Convention obligations[79]

The Netherlands is a signatory to the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol, as well as to the other UN human rights treaties such as Convention against Torture (CAT), International Convention on Civil and Political Rights (ICCPR) and Convention on the Rights of the Children (CRC). The Netherlands is also party to the European Convention of Human Rights (ECHR). The legal protection obligations deriving from these treaties, with non-refoulement as a cornerstone principle, are implemented in Dutch national legislation, more in particular, Article 29 of the Dutch Aliens Act 2000. Article 29(1)(a) refers to Refugee Convention protection. Protection based on Article 29(1)(b) is granted if a person risks 'serious harm' upon return to the country of origin (subsidiary protection). This (sub)article implements article 15 of the EU Qualification Directive, which covers treatment in violation of Article 2 and 3 ECHR, including individuals who are at real risk because of mere membership of a group[80] and/or for reasons of indiscriminate violence and attacks on civilians in the country of origin (non-individualised violence).[81]

The scope of the protection against refoulement in the ECHR, as interpreted by the European Court of Human Rights (ECtHR), is broader than under the Geneva Convention.[82] Any return of an individual who would face a real risk of being subjected to treatment contrary to these articles is prohibited. Moreover, the need for protection against the treatment prohibited by Art. 3 ECHR has

79 This paragraph equals for a large (generic) part the paragraph on convention obligations in the Danish country report, as this part of the legal framework applies to both countries.

80 ECtHR, *Salah Sheekh v. The Netherlands*, no. 1948/04, 11 January 2007.

81 ECtHR, *NA. v. United Kingdom*, no. 25904/07, 17 July 2008. See also Article 15c EU Qualification Directive and the interpretation thereof in the CJEU *Elgafaji* case. The current protection grounds in Dutch legislation are limited to these so-called 'international protection grounds.' See further paragraph 'setting the scene.'

82 Vladimír Simoňák and Harald Christian Scheu, *Back to Geneva: Reinterpreting Asylum in the EU*, Wilfried Martens Centre for European Studies, 2021, p. 20.

been considered absolute in several Court rulings.[83] To prevent refoulement, it is not necessarily required to admit a person to the territory of a state, if sending him or her back does not lead to a situation where the person would be persecuted or runs a real risk of torture, inhuman or degrading treatment.[84] However, without assessing the individual case, it would be rather difficult to know whether someone has an arguable claim of a real risk of refoulement. So, ensuring effective access to an asylum procedure is a precondition to ensure the principle of non-refoulement.[85] In addition, article 4 of Protocol No. 4 to the ECHR prohibits collective expulsion. This prohibition in itself also requires that there is a reasonable and objective examination of the specific case of each individual asylum seeker.[86]

If a country has jurisdiction, it is obliged to respect and guarantee the human rights enshrined in the applicable international legislation. In case the Netherlands, a State-party to the ECHR, violates those obligations,[87] it can be held accountable for an 'internationally wrongful act' by the ones whose rights have been violated.[88] In the context of the ECtHR jurisdiction this is not only territorial,[89] but also applied extra-territorial if there is effective (territorial,

83 ECtHR, *Chahal v. United Kingdom*, 15 November 1996, paras. 76 and 79, referring to ECtHR, *Soering v. United Kingdom*, 7 July 1989, para. 88; ECtHR, *Ahmed v. Austria*, 17 December 1996, ECtHR, *Ramzy v. Netherlands*, 27 May 2008, para. 100, ECtHR, *Saadi v. Italy*, 28 February 2008, para. 137. See Jens Vedsted-Hansen, "European non-refoulement revisited", *Scandinavian Studies in Law*, 1999-2015, p. 272.

84 Daniel Thym, "Muddy Waters: A guide to the legal questions surrounding 'pushbacks' at the external borders at sea and at land," *EU Immigration and Asylum Law and Policy*, 6 July 2021.

85 See on this subject matter also Clingendael Institute, Monika Sie Dhian Ho and Myrthe Wijnkoop, "Instrumentalization of Migration," December 2022.

86 ECtHR, *Hirsi Jamaa v. Italy*, no. 27765/09, 23 February 2012. See also the Rule 39 measures issued by the ECtHR in August and September 2021 in order to stop the expedited (collective) expulsions of Iraqi's and Afghans stuck at the Latvian, Lithuanian and Polish borders (ECtHR Press Releases of 21 August 2021 and 8 September 2021).

87 ECtHR, M.A. v. France, no. 9373/15, 1 February 2018; ECtHR, *Salah Sheekh v. the Netherlands*, no. 194/04, 11 January 2007, para. 135; ECtHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989; ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991. See FRA: "Fundamental rights of refugees, asylum applicants and migrants at the European borders," 2020, p. 6.

88 International Law Commission, "Draft Articles on State Responsibility, Official Records of the General Assembly," Fifth-sixth Session (A/56/10), Article 2.

89 ECtHR, *Soering. v. United Kingdom*. No 14/038/88, 7 July 1989; ECtHR, *Bankovic a.o. v. Belgium a.o.* no. 52207/99, 21 December 2001; Hoge Raad, *IS women v. the Government of the Netherlands*, 26 June 2020, ECLI:NL:HR:20201148, paras. 4.16-4.18.

personal or functional) control over another territory or over individuals who have carried out the act or omission on that territory.[90] For example in the *Hirsi v. Italy* case, the ECtHR found that a group of migrants who left Libya with the aim of reaching the Italian coast, who were intercepted by ships from the Italian border police and the coastguard and returned to Libya, were within the jurisdiction of Italy. According to the ECtHR a vessel sailing on the high seas is subject to the 'exclusive jurisdiction of the state of the flag it is sailing'.[91]

This means that the Netherlands cannot be exempted from its human rights obligations, including non-refoulement and access to asylum, by declaring border areas as non-territory or transit zones or to externalise asylum procedure to other countries: the determining factor remains whether or not there is jurisdiction, either/and through de jure or de facto control by the authorities.[92] This does however not mean that access to asylum can only be provided for on Dutch territory. The 1951 Refugee Convention states that refugees must be protected but does not in itself prohibit that states negotiate cooperation agreements on *where* that protection is guaranteed, as long as the preconditions fulfil the legal state obligations. The ECtHR has accepted that states have the right to control the entry and residence of third country nationals.[93] Furthermore, the ECtHR has in 2020 drawn a line as to gaining territorial access to the European Union. In its judgment in the case of *N.D. and N.T. v. Spain* the Court concluded that Spain did not breach the ECHR in returning migrants to Morocco who had attempted to cross the fences of the Melilla enclave. The Court reasoned that because the group of migrants had not made use of the entry procedures available at the official border posts, the lack of an individualized procedure for their removal had been a consequence of their own conduct (i.a. the use of force and being in large numbers).[94] In other words, the line of argumentation in this case does require states to deploy effective legal options

90 See for an analysis of extra(territorial)jurisdiction and effective control: Advisory Council on Migration (ACVZ), "EU borders are common borders. Member States' responsibility for human rights protection at the EU's external borders," February 2022. See also Maarten den Heijer, *Europe and Extraterritorial Asylum*, 2012; Lisa-Marie Klomp, *Border Deaths at Sea under the Right to Life in the European Convention on Human Rights*, 2020; Annick Pijnenburg, *At the Frontiers of State Responsibility. Socio-economic Rights and Cooperation on Migration*, May 2021.

91 ECtHR, *Hirsi Jamaa v. Italy*, no. 27765/09, 23 February 2012.

92 See also Sergio Carrera, "Walling off Responsibility," *CEPS*, nr. 2021(18), November 2021, p. 12.

93 ECtHR, N. v. the United Kingdom [GC], no. 26565/05, 2008, para 30; ECtHR, Ilias and Ahmed v. Hungary [GC], no. 47287/15, 21 November 2019, para. 125.

94 ECtHR, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, 13 February 2020.

and means for access to protection for third country nationals, however it also takes into account the actions of the applicants to that effect.

The Netherlands, when becoming signatory to the ECHR, also adhered to the interpretation of the convention provisions through the jurisprudence of the Strasbourg Court. The ECtHR rulings have had significant impact on procedural and material asylum law in the Dutch national legal order and the operationalisation thereof. The ruling on the *M.S.S.* case for example led to long term suspension of Dublin transfer to Greece.[95] And with respect to the assessment who would (not) be entitled to protection (the scope of protection), the rulings in Salah Sheekh and NA form cornerstone jurisprudence. The general security and human rights situation have increasingly been taken into account by the Court in assessing the risk of a violation of article 3 ECHR upon return. In 2007 the Court stated that the mere membership of an ethnic minority which is systematically treated in a manner contrary to article 3 ECHR, is sufficient to conclude such a violation.[96] A year later, the scope of article 3 was broadened in the N.A. v. UK case, whereby extreme situations of generalized violence invoked the application of article 3 ECHR.[97] Next to including deterioration of medical conditions[98] in the case of Sufi and Elmi[99], the interpretation of non-refoulement seemed to be extended to also cover the risk of being exposed to certain inhumane socio-economic circumstances, in this case referring to the humanitarian situation in IDP/refugee camps.[100]

95 ECtHR, *M.S.S. v. Greece and Belgium*, no. 30696/09, 21 January 2011.

96 ECtHR, *Salah Sheekh v. The Netherlands*, no 1948/04, 11 January 2007.

97 ECtHR, *N.A. v. United Kingdom*, no. 25904/07, 17 July 2008. See also Rechtspraak Vreemdelingen (RV) 2008-1, commentary M.E. Wijnkoop.

98 However, the threshold in these cases is high. A breach of Article 3 would only be found in the most exceptional circumstances, namely where there were compelling humanitarian considerations such as an applicant being critically ill and facing mental and physical suffering and hastened death upon removal (ECtHR, *Paposhvili v. Belgium*, no. 41738/10, 13 December 2016.

99 ECtHR, *Sufi and Elmi v. United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011.

100 See also the development of the scope of the non-refoulement principle: Cornelis Wolfram Wouters, *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture*, 2009.

In the Netherlands, the policy rules were adapted as a result of Court rulings. This led throughout the years to a rather complicated variety of group-based policies with different standards of risk assessment, highly influenced by Country of Origin reports.[101] The Dutch government recently expressed the opinion that the system is over-legalistic and far too complicated, not only with respect to the scope of protection but also regarding the administrative and procedural conditions for return decisions and Dublin cases.[102] The government claims that this increasing complexity contributes to the backlogs, and the current high eligibility rate.[103]

Meanwhile, the importance of a thorough substantial investigation of all relevant elements of a case to assess the credibility of the claim and the risk upon return has recently been illustrated in the case of the Bahrein national who was sentenced to years of imprisonment after deportation by Dutch authorities. The ECtHR unanimously found a violation of article 3, holding the Netherlands legally accountable and imposed a fine of 50.000 euros.[104]

European Union law

As stated previously, the Dutch asylum system is in general terms closely linked to the minimum standards of the EU acquis on asylum procedures and reception conditions.[105] The interpretation of protection grounds has invoked some interesting legal questions on the scope and content of protection grounds.

The EU Qualification Directive refers to two forms of protection: 1) refugee status based on the 1951 Convention, and 2) subsidiary protection in case of a real risk of serious harm. Article 15 defines three specific types of harm which constitute

101 See also paragraph ‘national asylum system’ in this report.

102 Not only the Strasbourg, but also the Luxembourg court.

103 Parliamentary documents, *Kamerstukken II*, 19673, no. 3100, 28 April 2023. See also the attachments.

104 ECtHR, *A.M.A. v. The Netherlands*, no. 23048, 24 October 2023.

105 This does not mean that they are completely synchronized or that there is no legal debate on the implementation or interpretation of certain aspects of the Dutch procedure in light of the EU rules. See for example the discussion between the Netherlands and the European Commission the Schiphol procedure (see under ‘border management’), and the discussion on the starting point of various phases at the beginning of the procedure (lodging, registration, submittance). See on this matter the preliminary questions of the regional court Haarlem of 20 October 2023, ECLI:NL:RBDHA:2023:15961. The same goes for reception conditions: see for example the discussion on the 24 weeks limitation for asylum seekers to work.

the qualification for subsidiary protection, based on article 2 and 3 ECHR, as interpreted by the Strasbourg jurisprudence. It has been an extensive discussion whether or not article 15 c (a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict) indeed intended to extend the grounds of protection or that is was merely a codification of existing asylum law.[106] In the Elgafaij case, the CJEU considered the scope and interpretation of article 15c in light of the ECtHR interpretation of article 3 in the NA. v UK case. The Court held that the term 'indiscriminate' implies that the violence 'may extend to people irrespective of their personal circumstances' when: '[...] the degree of indiscriminate violence characterizing the armed conflict taking place … [must reach] such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.'[107] It also stated that article 15c QD should be applied and interpreted autonomously from article 3 ECHR as the content differs (para. 28).[108] In a very recent verdict of November 2023, the CJEU stated that, in contrary to the views of the Dutch Council of State jurisprudence and the government, article 15c does not only apply in 'exceptional circumstances', but that individual circumstances of the individual applicant should also be considered in the assessment whether an article 15c situation is present ('any other element'). This could be read as a 'gliding scale' of situations in which article 15c is applicable.[109]

106 See also EASO, *Article 15c Qualification Directive. A judicial analysis*, December 2014; For the debate in Dutch parliament: Parliamentary documents, *Kamerstukken II* 30925, no. 25, p. 1047 and ff.

107 CJEU, *Elgafaij v. The Netherlands*, C465/07, 17 February 2009, para. 37. Other relevant jurisprudence: In Diakité, the CJEU concludes that the concept of 'internal armed conflict' under Article 15(c) QD must be given an interpretation, which is autonomous from international humanitarian law. (CJEU, Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides, C-285/12, 30 January 2014, para. 25). The judgment CF and DN is of particular importance for the interpretation of the concept of 'serious and individual threat to a civilian's life or person' in the context of an international or internal armed conflict under Article 15(c) QD (*CJEU, CF and DN v Bundesrepublik Deutschland*, C-901/19, 10 June 2021).

108 See also para. 39 where the Court states that the more evidence that a person in affected for personal reasons, the lower the threshold of indiscriminate violence has to be in order to grant subsidiary protection.

109 CJEU, *X. Y. and others v. The Netherlands*, no. C-125/22, 9 November 2023.

Next to decisions on the meaning of article 15 c QD, the CJEU has also delivered landmark decisions on the scope and interpretation of the refugee convention status (article 15(a)), more in particular regarding persecution grounds of "social group"[110] and "political opinion."[111] This again illustrates the (legal) complexity of the scope and interpretation of circumstances amounting to the need for protection, and the implementation thereof in the national legal system.

Dutch deviation from (minimum) EU standards

These are some interesting aspects of asylum law and policy where the Netherland deviates from the general minimum norms laid down in the EU asylum acquis.

Whereas free *legal aid* is not required in the first instance procedure under the EU acquis, and only under certain conditions in the appeals procedure, in the Netherlands, it is provided by the state, at least during the first asylum application.[112] This is based on the consideration that the provision of legal aid in the early stages of the asylum procedure increases the efficiency of the process by allowing decision making authorities to assess a complete and accurate file, reduces the burden on decision-makers, prevents unnecessary procedures and better safeguards the right to non-refoulement. Critics have stated that the involvement of legal aid throughout the whole procedure has indeed had the opposite effect, being even more 'juridification' of the asylum process, and has led to more legal proceedings. Despite several policy debates and although access to legal aid has been restricted in subsequent and repeated applications,[113] free legal aid in first instance proceedings has still remained.[114]

The Netherlands has a *single status* system since the introduction of the Aliens Act 2000. This means that the permits based on refugee and subsidiary protection[115] are accompanied by the same set of material rights. The rationale

110 CJEU, *X.Y.Z. v. The Netherlands*, C 199/12, 200/12, 201/12, 7 November 2013.

111 CJEU, *S.A v. The Netherlands*, C151/22, 21 September 2023.

112 "ECRE/ELENA Legal note on access to legal aid in Europe," European Legal Network on Asylum, November 2017.

113 Government coalition agreement 2017-2021 "Confidence in the Future" mentioned the intent to withdraw free legal aid in the first instance asylum procedure.

114 DCR, "Blij met behoud rechtsbijstand asielzoekers," 9 April 2020.

115 As the former 'c-' ground relating to traumatic experiences is also included under subsidiary protection in the national policy rules, this can also be considered a more favourable standard then required by EU law. See paragraph 'setting the scene'.

behind this system is that asylum seekers would then have no reason to continue legal proceedings. The refugee status does not provide for additional rights or a 'stronger' status and is thus no more attractive than subsidiary protection. Since its introduction in 2001, the single-status system has helped to simplify the asylum procedure, reduce the administrative burden and reduce delays due to further legal appeals. According to many experts, such as the Advisory Council on Migration, abolishing the single-status system would result in significant litigation by persons with subsidiary protection status, as is indeed the case in for example Denmark[116] and Germany. This would result in a lot of additional work for the Immigration and Naturalisation Service (IND) and the judiciary.[117]

As we have seen with the March 2022 activation of the EU *Temporary Protection* Directive for Ukrainian displaced persons, the Netherland has made a rather unique choice in the way it has implemented this Directive two decades ago. Instead of using the at the time still existing national categorical or *prima facie*-based protection grounds,[118] the government decided to 'grant' temporary protection by way of postponing the decision making process ('moratoria') and providing the displaced person with the status of asylum seeker.[119] As the categorical protection ground was removed from article 29 Aliens Act in 2012, formally the Netherlands system does not provide for a temporary protection status.[120]

However, all forms of protection are indeed temporary at first, and can currently end, be revoked or extended.[121] In the Netherlands, a protection status is initially granted for a duration of five years. This goes beyond the minimum norms in the EU acquis: Article 24 of the QD states that refugee status should be granted for at least three years, and subsidiary protection status for at least one year, or two years in the case of an extension. The Rutte III) government stated in its coalition agreement that the duration of the protection status would be brought

116 See country report Denmark.

117 Advisory Council on Migration, December 2022, p. 132.

118 Which could be revoked relatively easy in case of improvement of the security and human rights situation in the country of origin. See paragraph 'setting the scene' in this report.

119 Article 43a Aliens Act 2000. See for the Explanatory Memorandum to the legislative proposal: Parliamentary documents, *Kamerstukken II*, 29031, no. 3. See for an extensive legal analysis on the implementation of the Temporary Protection Directive in Dutch legal order: Karina Franssen, *Tijdelijke Bescherming van asielzoekers in de EU*, (Den Haag: Boom Juridische uitgevers) 2011.

120 See paragraph 'setting the scene.'

121 Article 32 Aliens Act 2000; Article 3.105c Aliens Decree 2000; C2/10.4 Aliens Circular 2000.

back from five to three years.[122] This legislative proposal dates from 2020 and has yet to be discussed in parliament.[123] Several legal experts have been critical of the proposal, both because of the lack of (legal) necessity and the practical consequences for both refugees and persons with subsidiary protection (impact on integration) and the high administrative burden for the decision making authorities and judiciary.[124]

Current state of play: The EU Pact and the Dutch position

As stated, in September 2020 the European Commission launched an extensive package of new proposals to revive and move forward the CEAS, the EU Migration and Asylum Pact: '*a fresh start on migration, to build confidence through more effective procedures and strike a new balance between collective responsibility and solidarity*'.[125] This Pact includes five legislative proposals: the Asylum and Migration Management Regulation (which includes a solidarity mechanism), the Screening Regulation, the Asylum procedures regulation, amended proposal Regulation on Eurodac and a Crisis Management Regulation.[126] These are the new ones, next to existing files such as instrumentalisation,[127] the Schengen Border Code and others:

122 Government coalition agreement 2017-2021, "Confidence in the Future".

123 Parliamentary documents, *Kamerstukken II*, 35691.

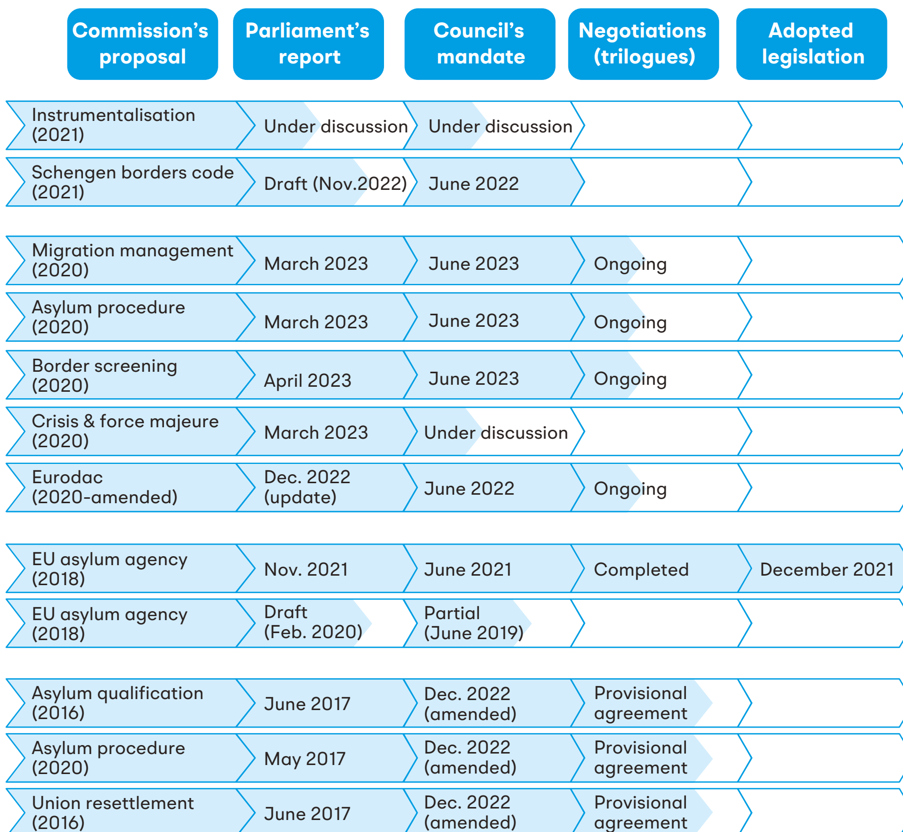
124 Council of State, Advisory Council of Migration, Legal Bar Association, and several legal and human rights organisations, see: Parliamentary documents *Kamerstukken II*, 35691, attachments.

125 See for various (critical) assessments and comments on the EU Migration and Asylum Pact: ACVZ and AIV, *Het Europese asielbeleid: twee grote akkoorden om de impasse te doorbreken*, 1 December 2020; Hanne Beirens, "The EU Pact on Migration and Asylum. A bold move to avoid the abyss?" MPI Europe, October 2020; CEPS, "ASILE Project" and various blogs via EU Immigration and Asylum Law and Policy.

126 European Commission, "Migration and Asylum Package."

127 Monika Sie Dhian Ho and Myrthe Wijnkoop, "The instrumentalization of migration. A geopolitical perspective," Clingendael Institute, December 2022.

Overview of current state of play reform CEAS – EU Migration and Asylum Pact



Commission's proposal	Parliament's report	Council's mandate	Negotiations (trilogues)	Adopted legislation
Instrumentalisation (2021)	Under discussion	Under discussion		
Schengen borders code (2021)	Draft (Nov.2022)	June 2022		
Migration management (2020)	March 2023	June 2023	Ongoing	
Asylum procedure (2020)	March 2023	June 2023	Ongoing	
Border screening (2020)	April 2023	June 2023	Ongoing	
Crisis & force majeure (2020)	March 2023	Under discussion		
Eurodac (2020-amended)	Dec. 2022 (update)	June 2022	Ongoing	
EU asylum agency (2018)	Nov. 2021	June 2021	Completed	December 2021
EU asylum agency (2018)	Draft (Feb. 2020)	Partial (June 2019)		
Asylum qualification (2016)	June 2017	Dec. 2022 (amended)	Provisional agreement	
Asylum procedure (2020)	May 2017	Dec. 2022 (amended)	Provisional agreement	
Union resettlement (2016)	June 2017	Dec. 2022 (amended)	Provisional agreement	

Source: DG Migration and Home Affairs, European Commission

The Netherlands prepared a Strategic agenda which outlines the focus and position of the Dutch government in this CEAS reform.[128] With respect to the current negations on the Pact, the Dutch government, with a view on preventing secondary migration within the EU, is pushing for a stronger *Dublin* system through better alignment of national asylum policies across Member States, faster procedures,[129] the extension of the period of responsibility under the Dublin

128 Ministry of Foreign Affairs, "A renewed European agenda for migration 2019-2024."

129 The Dutch government has for example signed Memoranda of Understanding with both Belgium and Germany to implement faster Dublin transfers: Parliamentary documents, *Kamerstukken II*, 32 317, no. 860, 20 October 2023.

system, and the possibility to detain Dublin claimants awaiting their transfer. States that do not fulfil their Dublin responsibilities should not be able to benefit from the solidarity mechanism until they do so.[130] It also supports a fairer division of responsibility, where border states can expect solidarity in times of crisis.[131]

The Dutch government considers the *Crisis Regulation* useful for dealing with large numbers of asylum seekers, as long as attention is paid to the protection of fundamental rights.[132] To ensure this, the government pushed for a stricter formulation of when a crisis situation can be invoked.[133] MS should not be able to decide unilaterally when a situation is considered to constitute a 'crisis' in order to prevent abuse, but on the other hand the decision-making process should also not be completely dependent of the Commission actions.[134] The Netherlands wants to retain the possibility to impose internal border controls if necessary.[135]

The Government is in favour of a *pre-screening* assessment to quickly distinguish between those in need of protection and those who are not. It supports the proposed changes to the Asylum Procedures Directive as they could limit the number of people who arrive irregularly and have no right to protection entering the EU, while also increasing returns. Fearing that unaccompanied minor asylum seekers would be sent ahead if they were not included in the pre-screening measure, the Dutch government aimed for including them into the border procedures,[136] but this position was not sufficiently supported by other MS. The government furthermore pushed for a broadened connection criterium in

130 Parliamentary documents, *Kamerstukken II*, "Verslag van de formele bijeenkomst van de Raad Justitie en Binnenlandse Zaken, 8 en 9 juni 2023," 19 June 2023.

131 Parliamentary documents, *Kamerstukken II*, 22 112, no. 2955, 4 November 2020.

132 Parliamentary documents, *Kamerstukken II*, 22 112, no. 2955, 4 November 2020.

133 Parliamentary documents, *Kamerstukken II*, 22112, nr. 2963, 16 November 2020.

134 Parliamentary documents, *Kamerstukken II*, 32 317, no. 860, 20 October 2023. This requires a robust legal framework with clear definitions and possibilities for derogation – with proportionate measures that are limited in time. See also: "Verslag van de informele bijeenkomst van de Raad Justitie en Binnenlandse Zaken," Ministerie van Justitie en Veiligheid," 29 August 2023, p. 5.

135 In response to the Council's political agreement of 4 October 2023 on the Crisis Management Regulation, which includes instrumentalisation, ECRE was highly critical about the Council's decision to allow Member States national discretion to deviate from the Regulation in various situations. ECRE, "Editorial: So that's it Then? Agreement(s) on the EU Asylum Reform," 6 October 2023.

136 According to the Dutch government, this would have a deterrent effect on minors who would be sent by their families to obtain a permit and apply for family reunification.

the safe third country concept with the aim of creating more possibilities for application of that concept.[137] More on this topic can be found in the paragraph on ‘externalisation’.

Cooperation with partner countries should be focused on mutual benefits. The Netherlands calls for broad partnerships with third countries on a case-by-case basis, in which migration should be one of several pillars, as in the agreement with Tunisia.[138] In order to prevent instrumentalization of migration, the government does not exclude the possibility of negative instruments such as tariff preference schemes or visa measures following the lack of cooperation on return. Cooperation agreements to externalise certain dimensions of migration policy, are deemed to be necessary for an effective European policy.

On 20 December 2023 the Council, Commission and European Parliament reached a political agreement on the main aspects such as the border procedures and solidarity mechanisms.[139] Once these proposals are formally adopted by the European Parliament and Council, the pillars of the New Pact on Migration and Asylum will be in place. Then, specific legislative acts will be adopted, and Member States will need to implement the new rules in their national legislation.

137 Parliamentary documents, *Kamerstukken II*, “Verslag van de formele bijeenkomst van de Raad Justitie en Binnenlandse Zaken, 8 en 9 juni 2023,” 19 June 2023.

138 Parliamentary documents, Kamerstukken II, 32 317, no. 860, 20 October 2023.

139 European Commission, “Historical Agreement on EU Pact Migration and Asylum,” 20 December 2023.

3 Border management and procedures

In accordance with the Schengen agreement, the Netherlands does not conduct any internal Schengen border controls. Border controls do occur at the external borders at airports, seaports, and along the coast.[140] The responsible actor for border management control and initial receipt of asylum seekers is the Royal Netherlands Military Police (KMar).[141]

The Netherlands has an asylum border procedure for those arriving at external Schengen borders, based on article 43 of the Asylum Procedures Directive.[142] They are denied entry and, in principle, held in border detention for the purpose of assessing their asylum claim. During the recast of the Directive in 2012, a discussion between the European Commission and the Dutch government arose regarding whether the Netherlands did indeed have border procedures as articulated in the Procedures Directive.[143] Despite the Netherlands' proclaimed reservation at the time, the government now recognises it as a border procedure which should be conducted according to the provisions in the Directive.

The police (seaport) or the KMar (airport) transfers those seeking asylum at the external border to the responsibility of the IND at the Judicial Centre at Schiphol Airport. In 2022, 1,550 asylum seekers filed an application at the border, a 38% increase in comparison to 2021.[144] Nationality and identity assessments are initiated, as well as a medical examination. Subsequently a six day rest and preparation time (RVT) starts,[145] after which the accelerated asylum procedure begins (again 6 days), during which the asylum seeker is held in the immigration

140 According to the Council agreement concluded on 8 June 2023 border screening and border procedures at the external Schengen borders are mandatory. Ministry Justice and Security, *De Staat van Migratie 2023*, 6 Oktober 2023, p. 22.

141 Asylum Information Database Europe (AIDA), *Country Report The Netherlands*, Update 2022, May 2023, p. 23.

142 AIDA, *The Netherlands*, 2023, p. 56 ff.

143 DCR and UNHCR, "'Pas nu weet ik: vrijheid is het hoogste goed': Gesloten Verlengde Asielprocedure 2010-2012", April 2013, p. 9.

144 Ministry Justice and Security, *De Staat van Migratie 2023*, 6 Oktober 2023, p. 103.

145 DCR, "Uw asielaanvraag," March 2021, p. 6.

detention centre at Schiphol.[146] There are various groups that are exempted from the asylum border procedure and are thus not subjected to border detention: unaccompanied children, families with children, and vulnerable persons who are in need of special procedural guarantees (for example victims of torture or rape). They are automatically referred to the general asylum procedure.[147]

The IND can legally extend its decision up to 28 days. Upon a positive decision, the refugee will be moved to a reception centre until housing in a municipality becomes available. If the IND needs more time to assess the asylum application, or if the IND decides the asylum application needs to continue in the General Asylum Procedure, the asylum seeker is transferred to a reception centre to await the asylum procedure.[148] Upon a negative decision, based on being inadmissible, manifestly unfounded, or unconsidered due to another Dublin country's responsibility, the asylum seeker technically has to leave the territory, though they have the right to appeal the decision.

During ongoing EU-level debates regarding the EU Pact on asylum and migration, the Netherlands has been a strong proponent for strengthening external Schengen border management. The Dutch cabinet has particularly called for the release of additional funding for external border management, the establishment of asylum border procedure pilots,[149] and the full utilisation of Frontex.[150]

146 Unaccompanied children, families with children, and those who cannot be detained due to personal needs, are excluded from this detention policy.
147 AIDA, *The Netherlands*, 2023 p. 57.
148 IND, "Asielprocedures in Nederland," July 2023.
149 Parliamentary documents, *Kamerstukken II*, "Geannoteerde agenda voor de Europese Raad van 29 en 20 Juni 2023," June 2023, p. 5.
150 Parliamentary documents, *Kamerstukken II* Bijlage 35 BWO Pakket Migratiestroom asiel JenV, July 2023, p. 1.

4 Access and national asylum procedures[151]

The Dutch asylum procedure

In the Netherlands, anyone who claims to be in need of protection can apply for asylum. As mentioned before, Dutch asylum protection is based on a single-status system. Whatever the grounds – convention-refugee (A-status) or subsidiary protection (B-status) –, everyone granted protection receives the same legal status with the same material rights and benefits.[152] First the claim will be assessed on the merits of a refugee status. If the grounds for refugee protection are not fulfilled, the assessment on subsidiary protection will be conducted.[153]

The IND is the responsible decision-making authority for asylum applications (both at the border and on the territory). Other actors are the KMar (responsible for registration at the Dutch border, *see above*), the Aliens police (responsible for registration on the territory), the Central Agency for the reception of asylum seekers (COA) and the Return and Departure Service (DT&V).[154]

Asylum seekers arriving from non-Schengen countries by plane or boat can apply for asylum at Schiphol Airport application centre, which is a closed border procedure. Others arriving via land borders are directed to Ter Apel, the central registration centre. However, due to the recent capacity issues and backlogs, it was, and is, not always possible to provide for sufficient accommodation, and instead asylum seekers are sent to any reception centre that has available capacity.[155] In order to manage the crisis situation COA can also use temporary

151 In this paragraph a descriptive overview will be given of the characteristics of the Dutch national asylum system for the purpose of this research project. It is not intended nor possible to address all particularities, elements or factors of the national procedure. See AIDA, *The Netherlands*, 2023, for an extensive overview of the Dutch asylum procedure.

152 IND, "Apply for asylum in the Netherlands," 25 April 2023. Also direct family members who reunite within the three-month period after the status of the referent is granted receive an asylum status.

153 AIDA, *The Netherlands*, 2023, p. 22.

154 AIDA, *The Netherlands*, 2023, p. 18.

155 AIDA, *The Netherlands*, 2023, p. 18.

(crisis) emergency locations (*noodopvang*), which include locations such as sport halls, cruise ships, and hotels.

Once someone has registered and applied for asylum (a process that in principle should last three days) he or she is sent to a Process Reception Centre (POL). In January 2019, a new registration process was introduced, that requires every asylum seeker to complete an extensive form at the start of the registration procedure.[156] The completed form is followed by a registration interview (Aanmeldgehoor). During the registration interview, questions can be asked about identity, nationality, travel route and family members. Additionally, the IND briefly questions the asylum seeker as to their reasons for requesting asylum, to judge the complexity of the case, to better prepare for subsequent steps to be taken during the rest of the procedure, and to assess whether the asylum seeker is in need of specific procedural guarantees.[157]

Due to the ongoing capacity problems in Ter Apel,[158] the IND temporarily followed an alternative procedure in which they grouped asylum seekers based on a quick first assessment (first time applicants, unaccompanied minor refugees, family members subject to family reunification, and a rest category). The first group was then transferred to an alternative centre elsewhere first, to await the possibility to register.[159] Once registered, they were transferred to a reception centre to await their interview, while the other groups were waiting in Ter Apel. This alternative location was closed in March 2023.[160]

Legal assistance is available to asylum seekers from the first instance onwards, though sometimes the available time for the lawyer and asylum seeker is in practice limited. Asylum seekers are also allowed to appoint their own lawyer, that is paid by the Legal Aid Board if they fulfil the criteria. The Dutch Council for Refugees (DCR) has an official position within the procedure to

156 This form contains questions on their (1) identity; (2) place and date of birth; (3) nationality, religious and ethnic background; (4) date of leaving the country of origin; (5) arrival date in the Netherlands; (6) remains/stay in one or more third countries when appropriate; (7) identity cards or passport; (8) itinerary; (9) schooling/education; (10) military services; (11) work/profession; and (12) living environment and family.

157 AIDA, *The Netherlands*, 2023, p. 26-27.

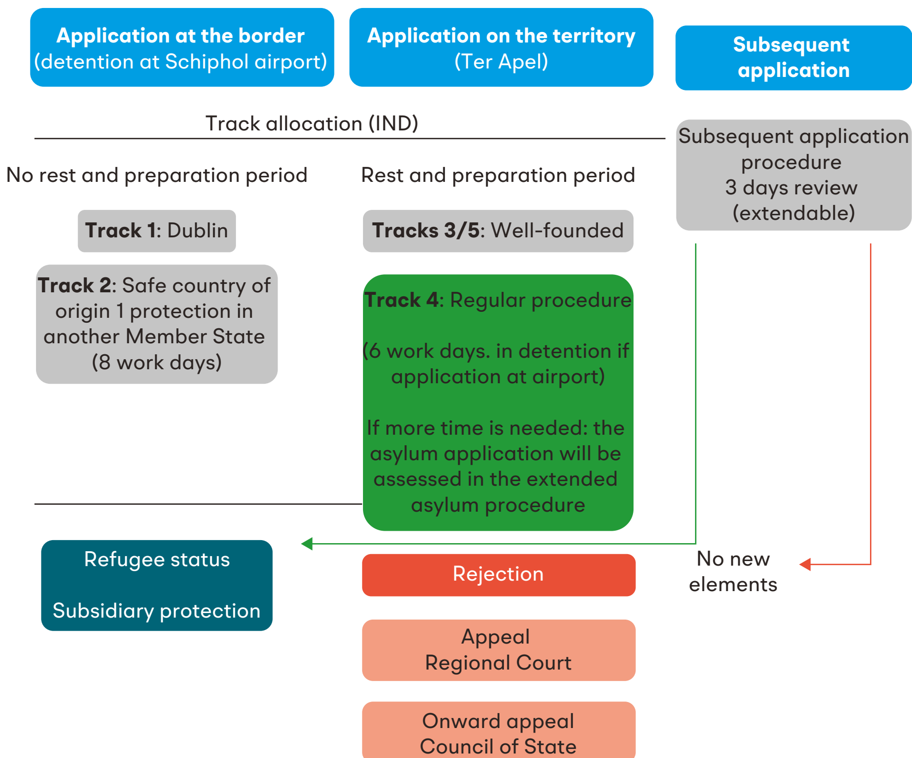
158 See paragraph 'setting the scene' in this report.

159 AIDA, *The Netherlands*, 2023, p. 104.

160 AIDA, *The Netherlands*, 2023, p. 20.

provide information about the asylum procedure and can offer legal advice to asylum seekers, both during the preparation period and during the procedure. Upon request, the asylum seeker or their lawyer can ask a representative of the DCR to attend the interview.

The Asylum procedure in the Netherlands. Source: AIDA, p. 17.



One status, different tracks

Following an increase of asylum applications in 2015, the IND developed a processing system for different (group)categories, or 'tracks', allowing for a more targeted procedure depending on the caseload.[161] This new policy came

161 In addition to the track procedures, the IND also rolled out various pilots for specific targeted groups, including for example brief hearings. See for more information in English: AIDA, *The Netherlands*, 2023, p. 36.

into force in March 2016.[162] The aim of including a track for cases not likely to be granted protection should prevent overcrowded reception centres.[163]

- Track 1: the Dublin procedure, is for people that applied for asylum in another European country or should have done so. This is mostly verified through Eurodac, a database where asylum seekers are registered.
- Track 2: the safe third country procedure, is meant for people from safe countries of origin or those who have already received protection elsewhere.
- Track 3: the fast track for manifestly well-founded, is meant for people expected to be granted a status, but this has not been applied thus far.
- Track 4: the regular route, 'Algemene Asielprocedure (AA)' (possibly followed by the extended procedure 'Verlengde Asielprocedure (VA)), is meant for all applications not filtered out by other tracks.
- Track 5: the manifestly well-founded applications with short investigation, this track is for those cases where more investigation into someone's identity is needed for track 3 applicants (not applied yet).[164]

In 2022, 80% of the claims were assessed in track 4, 17% in track 1, and 3% in track 2.[165]

Dublin procedure (track 1)

In this procedure, asylum seekers are given one interview, which starts as soon as possible, without a rest or preparation period (RVT) beforehand. This interview does not give the asylum seeker the opportunity to discuss the reason for their asylum application but is rather designed to allow the asylum seeker to explain why they are applying in the Netherlands and not in the country responsible under the Dublin Regulation. In addition, the interview is used to verify the person's identity and travel route. After that, the IND will either decide on a preliminary refusal or transfer the case to the general asylum procedure. In the first case, the IND asks the responsible country to assess the claim. Together with a lawyer, an asylum seeker who has been provisionally refused can request further investigation. After a final rejection, the asylum seeker must leave the

162 The 'five tracks' policy does not fully follow the structure of the Directive in terms of regular procedure, prioritised procedure, and accelerated procedure.

163 IND, "Werkinstructie SUA," 25 June 2021. Parliamentary documents, *Kamerstukken II*, "Bijlage 42 BWO Factsheet Sporenbeleid IND," 10 July 2023.

164 AIDA, *The Netherlands*, 2023, p. 21.

165 Ministry Justice and Security, "*De Staat van Migratie 2023*," 6 Oktober 2023, p. 12.

country within four weeks, but the appeal remains open for one week. After the appeal, the asylum seeker is expected to return to the responsible Dublin country, but in the meantime, they can stay in a reception centre. If the IND decides to fully assess the claim, the application will be transferred to the general asylum procedure.[166]

The fast asylum procedure (track 2)

In this fast-track procedure the IND quickly assesses a possible need for protection mostly based on the nationality and/or travel route. An asylum application can be declared inadmissible in case a third country is regarded as a safe third country for the asylum seeker (article 30a (1)c Aliens Act). The Netherlands has a list of safe countries of origin[167], but not of safe third countries. Whether a country is a safe third country for that asylum seeker is instead assessed on a case-by-case basis. However, the IND does work with 'internal information messages' on the general safety of the certain countries.[168] If someone has already received protection elsewhere, the IND will only assess the reason why the asylum seeker cannot reasonably be expected to return. If more information or time is needed to assess the claim, the case is referred to the AA or the Extended Asylum Procedure (VA). A refusal can be appealed. If the appeal fails, the asylum seeker must leave the country immediately and is subject to a re-entry ban. Rejected applicants are either held in reception centres pending their return, or in immigration detention if removal is impossible but is expected to be possible within a reasonable time. If the appeal is successful, the case continues in the extended procedure.[169]

The general procedure (AA > VA) (track 4)

This procedure should last 6 days, falling under AA+ when it takes up to 9 days. This may be followed by an extended procedure, *verlengde Asiel procedure (VA)*, taking up to 6 months, with possibilities to extend for another 9 and then 3 months. It is the only track where the asylum seeker has the right to preparation and medical examination time (of minimal 6 says). During this time, the asylum

166 IND, Asylum procedures in the Netherlands, 25 July 2023; Berte Advocaten, "The Dublin procedure (track 1)," accessed 18 October 2023.

167 AIDA, *The Netherlands*, 2023, p. 86 ff.

168 AIDA, *The Netherlands*, 2023, p. 84. See for the national application of the STC concept also paragraph 'externalization' of this report.

169 IND, Asylum procedures in the Netherlands, 25 July 2023; Berte Advocaten, "The Dublin procedure."

seeker receives information and advice from the Dutch Council for Refugees and legal aid.[170]

After the registration (including an interview about the nationality and identity of the asylum seeker) and rest and preparation time, the asylum-seeker can be called in for the procedure on the merits of the asylum claims. An interpreter, a lawyer and a volunteer from the Refugee council may be present here. After the asylum interview, the IND can either grant asylum or decline the application preliminarily, after which a lawyer again can offer an alternative view in writing,[171] followed by a definite decision by the IND. This process is meant to last 5 days[172] after which three options remain:

1. the asylum seeker has a right to asylum and is granted a permit for 5 years. After this decision, the person moves to an asylum seekers centre (asielzoekerscentrum (azc)) until a municipality has place for housing;
2. The IND needs more time to assess the claim, for which the asylum seeker is moved to the extended procedure. The asylum seeker possibly moves to an azc at this stage;
3. The asylum request is rejected, after which there is the possibility of appeal (see below).[173]

Extended procedure

The extended procedure is intended not only for cases where more time is needed to assess the application, but also for unaccompanied minors under 12 years and persons who are too ill to attend an interview. During this procedure, all asylum seekers are transferred to a regular asylum reception centre. If the application is provisionally rejected, the asylum seeker has 4-6 weeks to submit an appeal. The IND then has a maximum of 6 months to decide, with the possibility of extension.[174]

170 AIDA, *The Netherlands*, 2023, p. 27.

171 Lawyers are not obliged to do so if they expect the case to fail. In that case the asylum seeker can still request a second opinion by another lawyer.

172 There are different grounds for extending this period with a set amount of days (amounting up to 29 days max.), this is laid down in art. 3.115 Aliens Decree.

173 COA, "Aanmeldgehoor," accessed on 18 October 2023; AIDA, *The Netherlands*, p. 32.

174 With possibilities for extension in the case of heavy caseloads, complex cases, or other specific circumstances. This extension cannot lead to a processing time of more than 21 months.

In general, procedural safeguards are in place for unaccompanied minors, families with children, and victims of torture or violence. Due to their vulnerability, these groups are also not subject to border procedures, including detention. For other groups it depends on whether the asylum seeker's particular individual circumstances constitute a disproportionate burden.[175] Asylum seekers who claim to be minors without any credible evidence must undergo an age assessment by the Royal Police (KMar) or the Immigration police (AVIM) together with IND staff. These assessments are carried out independently of each other, to ensure a fair assessment.[176]

Burden of proof: credibility and risk assessment

Art. 31 of the Aliens Act regulates the burden of proof and credibility assessment for asylum seekers. Although the asylum seeker does not bear the burden of proof, he or she must provide credible evidence of the fear of persecution.[177] However, the IND has an active duty to investigate, in line with EU law.[178]

The IND will first make a factual assessment of the asylum claim. The IND performs an 'integral weighting' of all the elements of the claim. Using credibility indicators, the IND assesses how much and by what circumstances the credibility of the relevant element is affected or enhanced. The IND would then assess whether the credible relevant elements and the associated plausible presumptions are of a such weight that they must be qualified as well-founded fear of persecution within the meaning of the Refugee Convention or a real risk of violation of Article 3 ECHR.

Within the Dutch asylum procedure, much emphasis is put on the credibility of an asylum seeker's identity and nationality. This is assessed prior to the fear of persecution and/or real risk of serious harm: a *conditio sine qua non*. As most asylum seekers are not in the possession of sufficient documentation, it is a

175 Art. 5.1a (3) Aliens Act 2000; AIDA, *The Netherlands*, 2023, p. 64-67.

176 AIDA, *The Netherlands*, 2023, p. 61.

177 Art. 31 (6) Aliens Act 2000.

178 "In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application," QD Art. 4(1).

complex part of the procedure to establish nationality and identity.[179] Due to that complexity, there have been and still are quite some legal and policy debates on the emphasis, functioning and practice with respect to this issue within Dutch asylum system, and whether the benefit of doubt principle is duly applied.[180]

Group protection policies: 'at risk' and 'vulnerable minority' groups

In general, claims from nationals of 'safe countries of origin' are considered to be manifestly unfounded, which is why these people are referred to the accelerated procedure, Track 2. However, some groups are excluded from this rule. These include certain ethnic groups, unaccompanied minors or LGBTI asylum seekers.

In addition, the Dutch government has a country-specific policy for 35 countries that identifies groups at risk.[181] These people are more likely to be persecuted in a particular country. Although not always visible through grant rates, this group should face a lower burden of proof and gain access to refugee protection more easily.[182] 'Limited indications' should be sufficient to make a plausible case for protection based on a risk of serious harm. To assess this, the IND looks at the individual or their immediate relatives, examining what the asylum seeker has been through or what harm has been suffered by people in the same group.[183] Such groups at risk may be a particular ethnic, religious or social group.
For people who are more severely in danger, the government can classify a group as being at risk of group persecution. Being a member of such a group is sufficient to qualify for refugee protection, as was the case with Uyghurs from China.[184] A similar possibility exists for groups facing serious harm and that are thus eligible for subsidiary protection.

179 After the registration process, the asylum seeker will be interviewed regarding nationality, identity and migration route. In case of doubt, an investigation into the country of origin is initiated. To do so, someone's knowledge of their supposed country of origin can be tested. The person may also be subjected to a linguistic analysis.

180 See for more information on this issue and the criticsm: Advisory Council on Migration, "Naar een gelijker speelveld bij de vaststelling van nationaliteit en identiteit," 11 April 2022. Amnesty International-NL, "Bewijsnood, wanneer nationaliteit en identiteit ongeloofwaardig worden bevonden," November 2020. DCR, "Wegkijken en vooruitschuiven," 28 June 2023.

181 In 2022.

182 AIDA, *The Netherlands*, 2023, p. 91.

183 DCR, "Wegkijken en vooruitschuiven," 28 June 2023, p. 9.

184 AIDA, *The Netherlands*, 2023, p. 91.

These rather complicated country and group-based protection policies have been developed in response to various European judgements on the scope of protection and assessment of risks to serious harm (see also the paragraph in 'international legal framework' above), and occasionally raises the question whether in fact Dutch asylum policy has in fact become overly complicated with too many guidelines and everchanging policy rules.[185]

Appeal

In the Netherlands it is in general possible to not only appeal to the first instance decision by the IND, but also to the judgement of the courts. The Council of State Judiciary is the national highest court in asylum cases.[186]

Appeal to a rejection of the claim is possible in all track-procedures, though the rules on time limits and rights during this process may differ. For the AA procedure, asylum seekers have one week to appeal. Asylum seekers in extended procedures have 1-4 weeks[187] to lodge their appeal. Manifestly unfounded or inadmissible claims need to be appealed in one week. Usually, appeal has an immediate suspensive effect, with some exceptions.[188]

The intensity of the judicial review conducted by Regional Courts (administrative judges) changed in 2016.[189] Administrative authorities, in their factual assessment of an asylum claim, have a certain amount of discretion as to whether the statements of the asylum applicant are to be considered credible. As a result of this discretion, judicial review of the credibility assessment in Dutch asylum cases is restricted.

185 See for example the conclusion and recommendations in the report "Onderzoekscommissie Langdurig verblijvende vreemdelingen zonder bestendig verblijfsrecht," by the Van Zwol-Commission in 2019 on the protracted residence of foreign national without legal stay. See also on the subject matter of the relation between European jurisprudence and Dutch protection guidelines: Parliamentary documents, *Kamerstukken II*, "Actuele situatie asielketen," 28 April 2023.

186 See more extensively on appeals procedure: AIDA, *The Netherlands*, 2023, p. 38 ff.

187 Depending on the grounds.

188 AIDA, *The Netherlands*, 2023, p. 38: "Except for situations where the claim is deemed manifestly unfounded for reasons other than irregular presence, unlawful extension of residence or not promptly reporting to the authorities".

189 Council of State, ECLI:NL:RVS:2016:890, 13 April 2016.

The Regional Court is in general not allowed to do a full intensive review of the overall credibility of the statements of the asylum seeker.[190] Regional courts thus rule whether the grounds of a decision of the IND are valid, taking into account the grounds for appeal from the asylum seeker and the arguments of the IND: In terms of Dutch asylum law, the assessment of the credibility of an asylum claim is reviewed on the basis of the (un)reasonableness of the findings of the administrative authorities.[191] This is referred to as a restricted, or marginal, review. If the decision is not considered reasonable, the IND has to take a new decision. Furthermore, when assessing the appeal is examined by the Regional Court *ex nunc*, meaning it takes into consideration all new facts and circumstances which appear after the decision issued by the IND.

After the Regional Court issues a judgment on the decision from national asylum authorities, the asylum seeker and/or the IND may appeal against the decision of the Regional court to the Council of State. The Council of State carries out a marginal ex nunc review of the (judicial) judgment of the Regional Court and does not examine the facts of the case. An onward appeal does not have automatic suspensive effect. As a result, a provisional measure from the President of the Council of State is needed to prevent expulsion.[192] The Council of State changed its course as a result of the ECtHR judgment in A.M v. The Netherlands which stated that the onward appeal to the Council of State did not qualify as an effective remedy.[193]

All decisions of the appeal body are public and some are published. There are no obstacles in practice with regard to the appeals in asylum cases. In the case of a rejection of an asylum application, the asylum seeker can submit a repeat asylum application, on the condition that the circumstances that are relevant for the applicant changed.[194]

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190 This is, according to the Council of State, due to the fact that the IND has specific expertise to verify statements of the asylum seeker and is therefore in general in a better position to examine the credibility of the claim. An administrative judge can never substitute their own opinion on the credibility of the asylum seeker's statements to the authorities.

191 Karen Geertsema, *Rechterlijke toetsing in het asielrecht: Een juridisch onderzoek naar de intensiteit van de rechterlijke toets in de Nederlandse asielprocedure van 2001-2015*, (Den Haag: Boom Juridisch), 2018.

192 Council of State, ECLI:NL:RVS:2019:1072, 19 February 2019.

193 ECtHR, *A.M. v. The Netherlands*, no. 29094/09, 5 July 2016.

194 IND, "Repeat asylum application (HASA)," 1 July 2022. See on the right to an effective remedy also CJEU, Ghezelbash v. The Netherlands, C63/15, 7 June 2016.

Material rights during the procedure

In accordance with the Regulation on benefits for asylum seekers and other categories of foreigners 2005 (RVA), an asylum seeker is entitled to certain (non-)material reception rights during the procedure. The responsible actor for this is the COA.[195] These rights include a weekly allowance for food, clothing and personal expenditures, a public transportation card to visit a lawyer, healthcare insurance, the right to work[196], and education for children.[197] The weekly allowance depends on how large the household is and whether the asylum seeker takes the meals at the reception centre or not. For example, if the asylum seeker decides to provide for their own food, the weekly allowance is € 37,59, with a fixed €12,95 per person for clothing and personal expenditure. The law clearly states that the right to material reception conditions is only extended to those who lack resources.[198] Additionally, those being processed in Track 2, do not receive financial allowance and are instead given frozen microwave meals.[199]

Duration of permit

Irrespective of the basis for protection, a temporary permit is granted for 5 years. After this time, a status holder can apply to obtain either an EU long-term residence permit, or, and this is used more, a permanent asylum status. Requirements for these two pathways are similar, although in the first case a requirement of sufficient means is included, and for permanent asylum status there still needs to be a ground for asylum. Once somebody has a permanent residence permit, they can apply for naturalisation. For this, someone needs to be at least 18 years old,[200] have lived uninterruptedly in the Netherlands for at least 5 years, have a valid residence permit, be sufficiently integrated,[201] not have been convicted of a crime,[202] and denounced their current nationality.[203]

195 AIDA, *The Netherlands*, 2023, p. 95.

196 Information on the right to work has been previously discussed in the paragraph 'setting the scene: paradigm shift?' in this report.

197 Wettenbank, Article 9(1) "Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005."

198 Wettenbank, Article 2(1) "Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005."

199 AIDA, *The Netherlands*, 2023, p. 104.

200 Otherwise, an application is submitted together with a parent.

201 Tested through the civic integration examination at A2 level.

202 Leading to a prison sentence, training, or community service or order to pay a large fine (>€810).

203 Persons on a permanent asylum residence permit are exempted from this rule. AIDA, *The Netherlands*, 2023, p. 136-138; Articles 8 and 9 "Vreemdelingenwet 2000," Aliens Act 2000.

Revocation

The grounds for revocation are set out in Art. 32 of the Aliens Act. A status can be revoked when the status holder has provided incorrect information or withheld information that would have led to the rejection of the original application, poses a threat to public order or national security, or has established their main residence abroad. Other reasons for revocation are if the ground for granting a status has ceased to exist or if the ground for granting the permit was based on a family bond that no longer exists. The grounds for a revocation of the asylum status apply both to recognised refugees and people provided subsidiary protection.[204] Once there is an intention to revoke the temporary asylum status, the status holder will be informed in writing. The status holder then has six weeks to bring forward his or her view on this intention. If the IND remains committed to revoke, a hearing takes place, where the status holder can share their views, in attendance of a lawyer when requested. After the eventual cessation decision, the status holder has four weeks to leave the country, the same time period this person has to appeal the decision. If this is done in a timely manner, the right to lawful residence is extended up until the Court's decision.[205]

Capacity problems

The Netherlands has a structural problem with reception facilities and housing for asylum seekers and those with a protection status.[206] The COA repeatedly called for the need of more places, succeeding in extending at least the temporary facilities with 6000 places in 2021. According to the COA, this increased need was caused by the rise in arrivals, the lack of flow between temporary and permanent housing due to the situation on the housing market,[207] and the arrival of people evacuated from Afghanistan that were housed in military emergency facilities but that needed to move out from there. In 2022, emergency reception locations have increasingly been used to house people, but even this was not enough. This meant that the government pleaded municipalities to offer temporary reception through crisis emergency locations. Following this situation, the Minister for Migration, Eric van der Burg, proposed a law

204 AIDA, *The Netherlands*, 2023, p. 138.

205 AIDA, *The Netherlands*, 2023, p. 141.

206 EUAA was requested to assist during reception crisis. See also: EUAA & the Netherlands, "Operational Plan 2022-2023 Agreed by the European Union Agency for Asylum and the Netherlands," December 2022.

207 As is the case in many European states, the Netherlands has a significant shortage of (social) housing: COA, "Update: Benodigde opvangcapaciteit COA," 10 September 2021.

that would make creating reception facilities in municipalities mandatory, the 'Spreidingswet'.[208] This would enable the Minister better to distribute people in need of housing throughout the country. The parliament voted in favour of the law, but protest is expected from the Senate.[209] The COA said to be needing 75.500 places by the end of 2023, which is an increase of 20.500 since the end of 2021.[210]

In 2020, the Dutch government installed a task force that should speed up refugee assessment processes to deal with the backlogs. This experiment failed, as inexperienced people were put on complicated cases, sometimes leading to the case being referred to the extended process after all. Additionally, reasons for rejection of applications were poorly motivated. This resulted in questions about validity of the rejected applications.[211] In 2022, the IND had to pay 3,5 million euros worth of legal penalties for not timely deciding on asylum applications. In the first 4 months of 2023, the penalties were reduced to 2 million euros. A former law (temporarily) suspending such penalties imposed by the judiciary was found in violation with Union law and was thus cancelled.[212]

208 Legislative proposal ('Spreidingswet') on allocating reception for asylum seekers. Parliamentary documents, *Kamerstukken II*, no.36333, 28 March 2023.

209 Loes Reijmer, "De Tweede Kamer is voor, maar in de Eerste Kamer ziet het er somber uit voor Van der Burgs spreidingswet," *De Volkskrant*, 3 October 2023.

210 EUAA & the Netherlands, "Operational Plan 2022-2023," December 2022.

211 Justice and Security Inspection, "Vooral snelheid telde bij asielbesluiten taskforce IND," 7 January 2022.

212 Council of State, "Afschaffen rechterlijke dwangsom in asielzaken in strijd met Europees recht," 30 November 2022.

5 Extraterritorial access to asylum

Legal Pathways

Since 2015, discussions and negotiations about quotas for resettlement at the European Union level have been ongoing, including the European Resettlement Framework. However, any plan will not include specific targets or quotas as each Member State has the prerogative to decide on resettlement numbers.[213]

The Netherlands has a long tradition of UNHCR resettlement, although on a relatively modest scale. In the 1970s a Dutch resettlement policy framework was developed, and since 1984, a quota was introduced to be conducted in partnership with the UNCHR.[214] Refugees are identified and nominated by UNCHR, after which the IND tests whether that person is eligible for international protection according to Dutch asylum policy.[215] The Dutch resettlement policy aims to provide protection to victims of torture, women, children, single parents people with medical problems, human rights activists, and LBGTI+ people.[216] The Netherlands has furthermore resettled refugees from Turkey under the EU-Turkey deal.[217]

Since 1987, the Netherlands national quotum is determined at 2000 refugees per four years, averaging 500 refugees per year. In 2021, 480 refugees were resettled, while in 2022, in response to ongoing backlogs of the national quota due to COVID-19, 1,420 arrivals of resettled refugees were achieved.[218] Most of these refugees were of Syrian origin. Resettlement is not a binding legal obligation, but rather a voluntary contribution based on international solidarity with large refugee hosting countries and the most vulnerable refugees. However precisely because of the voluntary nature, resettlement has in

213 Advisory Council on Migration, *Realism about numerical targets*, December 2022, p. 151.
214 Parliamentary document, *Kamerstukken II*, 19 637 no. 2608, 26 May 2020.
215 Ministry Justice and Security, *De Staat van Migratie 2023*, 6 October 2023, p. 66.
216 Advisory Council on Migration, *Realism about numerical targets*, December 2022, p. 160.
217 Marcelle Reneman, "Het Nederlandse uitnodigingsbeleid weer teruggeschroefd," VU Verblijfblog, 15 March 2019.
218 Ministry Justice and Security, *De Staat van Migratie 2023*, 6 October 2023, p. 80.

recent years been a politically volatile issue. In January 2019, the government announced it would reduce the number from 750 to 500 per year.[219] Then, in 2021, the Dutch coalition agreement stated that it would increase its quotum up to 900 per year until 2025.[220] In August 2022, however, it was announced that in response to the distressing situation in Ter Apel, the government would reduce the number of resettlement places. At the same time, the government temporarily suspended all resettlements under the EU-Turkey deal.[221]

A consortium of various Dutch actors and organisations has recently, in September 2023, started with a project 'community sponsorship'. Instead of providing for a complementary legal pathway to resettlement, this project focusses on the closer involvement of local communities with the arrival and integration of resettled refugees, and on gaining more societal support for resettlement.[222]

Other legal pathways are not (yet) available. Diplomatic asylum or 'asylum at the post' has been abandoned since the Aliens Act 2000. Granting a humanitarian visa is no legal obligation under European law,[223] and the Netherlands has no (formal) national policy regulating the issuance of humanitarian visas according to Article 25 (1) of the Visa Code. There is a legal option through so-called d-visa or 'long-stay' visa, which are also granted to refugees who are selected under the resettlement scheme. However, they are hardly ever used other than for that purpose.[224] The only known exception regarding visa for asylum are the working agreements between the Ministries of Defence and Foreign Affairs, and the IND for Afghans since 2014. Afghan interpreters and high-profile employees that worked for the Dutch military in Afghanistan could apply to the Dutch embassy in Kabul for potential relocation to The Netherlands. After a positive advice from

219 Parliamentary documents, *Kamerstukken II*, 19637, no 2459, 1 December 2019.

220 Government coalition agreement 2021-2023, "Omzien naar elkaar, vooruitkijken naar de toekomst," 15 December 2021, p. 44.

221 Ministry Justice and Security, *De Staat van Migratie 2023*, 6 October 2023, p. 23.

222 Based on information shared by the DCR on 8 november 2023. See also on the issue on community sponsorship: Share Network & International Catholic Migration Commission (ICMC), *Fostering Community Sponsorship across Europe*, November 2019.

223 See CJEU, *X. and X. v. Belgium*, C638/16, 7 March 2017; ECtHR, *M.N. and others v. Belgium*, no. 3599/18, 26 5 March 2020.

224 Governmental working group 'Brede Maatschappelijke Heroverwegingen' (BHM), *Naar een wendbare migratieketen*, 20 April 2020, p. 54. DCR is also not familiar with any cases which have been granted a visa on humanitarian grounds.

the IND a visa would be granted, and the interpreters would apply for asylum after arriving in The Netherlands. But formally, this is not a structural program or regulation. [225]

Externalisation of asylum procedures

The concept of 'external asylum processing' within the European context already has a long history of political, public and academic debates. Already in 1986 (Denmark) and 1993 (The Netherlands) plans were tabled to send asylum seekers to (transit) processing centres in their region of origin to have the applications processed there.[226] Since the start of the new millennium, discussions on external processing come and go at the EU level.[227] These ideas however never materialised into actual legislative proposals, nor were they operationalised in practice. The 2004 The Hague Programme on the multiannual JHA agenda[228] and the 2008 EU Policy Plan on Asylum[229] mentioned a feasibility study on EU joint external processing which was never implemented. The explicit terminology of 'external processing' is completely lacking in the Stockholm Programme (2010-2014),[230] which refers to investing in regional protection programmes, resettlement schemes and '*new approaches to accessing asylum procedures targeting main countries of transit*.' The European Commission's communication on the Taskforce for the Mediterranean refers again to the possibility of exploring external processing of asylum applications in 2013 while stating that this exercise

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225 Commission Research Evacuation operation Kabul, *Reconstructie en analyse van de evacuatie uit Kaboel in augustus 2021*, 6 October 2023.

226 Advisory Council on Migration, *Advisory report: External Processing*, 9 September 2015; ECRE, *Protection in Europe: Safe and Legal Access*, February 2017; Pauline Endres Oliveira & Nikolas Tan, "External Processing: a tool to expand protection or to further restrict territorial asylum," MPI, February 2023.

227 For example the Blair proposals in 2003: Home Office, "New International Approaches to Asylum Processing and Protection and New Vision for Refugees," 10 March 2003; and the German and Italian proposal to create 'safe zones' in North-Africa in 2005: Bundesministerium des Innern, "Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration – Überlegungen des Bundesministers des Innern zur Errichtung einer EU-Aufnahmeeinrichtung in Nordafrika," Berlin, 2005.

228 Council of the European Union, "The Hague Programme: strengthening freedom, security and justice in the European Union," 3 March 2005.

229 European Commission, "COM(2008) 360 final: EU Policy Plan on Asylum," 17 June 2008.

230 European Council, "The Stockholm Porgrame: an open and secure Europe serving and protecting citizens," 4 May 2010.

could only be done "without prejudice to the existing right of access to asylum procedures in the EU."[231]

External processing gained new ground after the higher number of asylum applications in the European Union due to the Syria crisis. A proposal was put forward by the Austrian Minister of Foreign Affairs in 2016 to establish "protection zones" in or close to regions of origin,[232] followed by a MS non-paper on a 'Mobile Protection Scheme' consisting of EU and/or MS officials assessing claims outside the EU.[233] The Danish Social Democrats published a 'vision' along the same lines: asylum would no longer be possible in Denmark.[234] Also in the Netherlands, ideas on 'more effective' refugee protection schemes were put forward, although more based on the 'safe third country (STC)' concept than on fully externalizing asylum procedures: investing and improving the circumstances in the region of origin to such extent that it could be denominated 'safe'.[235]

This emphasis on the application of the STC concept rather than externalisation in the strictest sense of the wording, is also reflected in the more recent EU approaches. Most obvious example is the Joint EU-Turkey statement:[236] asylum seekers travelling for Turkey to Greece could be sent back to Turkey (being a 'safe' third country where they already 'stayed'). The application of the concept has been disputed, by raising the question to which extert Turkey was indeed considered 'safe'.[237] Apart from the proposal for disembarkation platforms and subsequent processing in North Africa ('safe ports'),[238] which never got further than the Brussels political discussions, no concrete plan or measures got

231 European Commission, "COM(2013) 869 final: Taskforce Mediterranean," 4 December 2013.

232 Ralph Atkins and James Shotter, "EU refugee policy helps people's smugglers, says Austria," *Financial Times*, 4 November 2015.

233 Austrian Federal Ministry of Interior and Danish Ministry of Immigration and Integration, "Vision for a better protection system in a globalized world," October 2018.

234 See also Nikolas Tan, "Visions of the Realistic? Denmark's legal basis for extraterritorial asylum," *Nordic Journal of International Law*, 91, 26 October 2022.

235 Parliamentary documents, *Kamerstukken II*, 19 637, nr. 2030, 8 September 2015.

236 European Council Press release, "EU-Turkey Joint Statement," 18 March 2016.

237 See for example, UNHCR Greece, "UNHCR's Position and Recommendations on the Safe Third Country Declaration by Greece," 2 August 2021; Mariana Gkliati, "The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees," in *Movements Journal*, Vol 3(2), 2017; Orçun Ulusoy, "Turkey as a safe third country?" *Oxford Law blog*, 29 March 2016.

238 European Council, Meeting Conclusions, 28 June 2018; UNHCR-IOM, Joint Letter to the European Council, 27 June 2018.

tabled.[239] Externalisation is not part of the 2020 EU Migration and Asylum Pact; the STC concept is however being renegotiated in the context of the new Asylum Procedures Regulation.[240]

At the backdrop of the pressing humanitarian refugee situation in regions of origin, transit countries, external EU borders and within the EU in recent years, the idea of making more use of the STC concept in combination with approaches to outsource asylum procedures to third countries is also being explored by destination countries, in the form of 'innovating partnership with third countries. Clear examples are the deal between Rwanda and the United Kingdom (non-EU Member),[241] the new Danish STC legislation (CEAS opt-out),[242] the Italian plans to externalise its national asylum procedure to Albania;[243] and the German announcement that they will 'examine' the possibilities.[244] In the Netherlands, there have recently been several parliamentary discussions on the subject matter of externalisation, with the most recent motion supported by the majority of parliament requesting the government to align with the Danish government on outsourcing asylum procedures to third countries.[245] Furthermore, several political parties who might become part of the next Dutch coalition government refer in their political programmes to 'protection in the region', outsourcing or

239 The recent EU-Tunisia deal should be clearly distinguished from the EU-Turkey statement, as the first only involves the transfer or return of Tunisian nationals. The Tunisian government was very resolute in declining to suggestion of 'taking over' asylum seekers from the EU.

240 COM/2020/611, 23 September 2020.

241 Monika Sie Dhian Ho en Francesco Mascini, "Dealen met Rwanda: dilemma's bij bescherming van vluchtelingen in derde landen," Clingendael Institute, 30 October 2023.

242 Nikolas Tan and Jens Vedsted-Hansen, "Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law," 15 November 2021.

243 Lorenzo Tondo, "Italy to create asylum seeker centres in Albania, Giorgia Meloni says," *The Guardian*, 6 November 2023.

244 Jessica Parker, "Germany agrees to consider UK-style plan on processing asylum abroad," *BBC News*, 7 November 2023.

245 Parliamentary documents, *Kamerstukken II* 32317 no. 813, February 2023, submitted by Eerdmans (JA21), highlighting the promising opportunities migration partner strategies allow for. The request was additionally made for the government to engage with the Danish government with regards to moving asylum reception and procedures to partners outside of the EU. See also previously: Parliamentary documents, *Kamerstukken II*, 19637, no 2866, April 2022. This motion, submitted by Brekelmans (VVD), called on the government to work within the EU to increasingly develop migration partnerships with third countries and to contact the UK government to learn from their experiences with the Rwanda deal received a majority vote in the parliament

externalizing asylum procedures.[246] Thus far the formal response of the current (fallen) Dutch government to these ideas has been somewhat reluctant, stating that international legal obligations are the basis of national asylum policy and that the Netherlands has to and will adhere to the EU asylum acquis (which is not binding to Denmark).[247]

Reasons for no external processing in practice

The main reason why external asylum processing proposals in all those years never materialized within the EU context are the various legal limitations, impracticalities, and objections of a more principled or ethical nature against this concept.[248]

Legal aspects[249]

The applicable legal framework depends on the form in which an external processing scheme is operationalised. If it is an EU arrangement, it is rather unclear and uncertain whether there is a sufficient *legal basis in Union law* for the EU to have actual competence to regulate such schemes. Article 78 on the scope of the competencies of the EU with respect to developing a common asylum system does not refer to extraterritorial asylum. And while paragraph 2 does not refer to any territorial scope, it could well be read that the wording

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246 Fadi Fahad, "Internationale dimensie van verkiezingsprogramma's," VU Verblijfblog, 6 October 2023.

247 Parliamentary documents, *Kamerstukken II*, 19637, no. 3079, March 2023.

248 See for example: UNHCR, Preliminary comments on UK proposals on regional protection and off territory processing zones, February 2003; Amnesty International, "Observations on UNHCR consultations on Convention Plus," March 2003; Amnesty International, "UK/EU/UNHCR Unlawful and Unworkable- Amnesty International's views on proposals for extraterritorial processing of asylum claims," June 2003. ECRE Statement on the Asylum and Access Challenge, 7 April 2003; ECRE, "Comments of the European Council on Refugees and Exiles on the Communication from the Commission to the Council and the European Parliament Towards a more accessible, equitable and managed international protection regime," (COM(2003) 315 final); House of Lords European Union Committee, "Handling EU Asylum Claims: New approaches examined: Report with evidence," Session 2003-2004 Report 11, London 2004; Gregor Noll, "Visions of the Exceptional: Legal and theoretical issues raised by Transit Processing Centres and Protection Zones," *European Journal of Migration Law* no. 5, 2003, p. 303-341. Madeline Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum?" *International Journal of Refugee Law*, 2006, p. 619 ff; Advisory Committee on Migration (ACVZ), "External Processing," December 2010; Violeta Moreno-Lax, "Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward," Red Cross EU Office, December 2015, p. 21-30.

249 ACVZ, "External Processing," December 2010.

explicitly focusses on intra-EU asylum processing, most clearly in subsection (e) on dividing the responsibility for considering asylum applications between Member States.

Assuming that the EU is not competent, an external processing scenario is excluded from the scope of the subsidiary legislation (i.e., directives and regulations). If somehow the EU is competent, then the wording of the directives and regulations are decisive. Both the Asylum Procedures and Reception Conditions Directive refer to applications and procedures in the Member States, whereas the scope of the Qualification Directive has no explicit territorial limits (but is rather connected to the Asylum Procedures Directive). However, article 3 of the APD states that it is applicable to all applications made on the territory or at the border.[250] This could mean that if a person has submitted an asylum application and is subsequently transferred to the external processing centre, based on Article 3 the Directive's standards also apply to procedures taking place there. In sum, there is clearly a lack of clarity on whether the EU is competent and whether EU law applies to externalisation processes. In any case, if it is left to the competence of individual MS, they are still bound by international legal obligations and (general principles of) EU law, such as non-refoulement, human rights standards, and effective remedies.

Moreover, there are also more general legal obstacles and constraints. These foremost concern jurisdiction[251] and transfer of persons intercepted to the territory of the third state where the processing centre is located. With respect to the latter: according to Article 9 of the current Asylum Procedures Directive, an asylum seeker has the right to remain in the MS assessing the application to await the outcome at first instance, either on the merits of the claim or transfer to a safe third country. This might stand in the way of transfer to a processing centre outside the EU for an assessment of the merits of the application, *unless* such a transfer is considered as an application of the STC concept. Article 33(2) sub c APD states that MS may declare an asylum application inadmissible in case there

250 Both the proposal of 2016 and 2020 for the Asylum Procedure Regulation changes that scope: Article 2 refers To: 'all applications for international protection made in the territory of the Member States, including at the external border, in the territorial sea or in the transit zones of the Member States, and to the withdrawal of international protection [...]This Regulation does not apply to applications for international protection and t requests for diplomatic or territorial asylum submitted to representations of Member States'.'

251 See paragraph 2 'international legal framework' in this report.

is a safe third country for the asylum seeker. Preconditions for the STC concept are laid down in Article 38 APD. Paragraph 2 (a) determines that an asylum seeker may only be transferred to a safe third country if he has a *meaningful connection* with that country, meaning for example that the person spent some time there.[252] According to the CJEU, in order to apply the STC concept, there must be a sufficient or significant connection and that 'mere transition' does not reach that threshold.[253]

Connection clause: historical background

The core of the safe third country concept is that an asylum seeker, even if he or she is entitled to protection, may be refused entry in the country of arrival because he or she can go to a safe third (i.e., other) country: he or she is 'in the wrong place' to apply for asylum. In the context of international law, the application of the 'safe third country' is generally legally justified if the prohibition of direct and indirect refoulement is respected and as long as the protection component is not compromised.[254]

The idea of a 'safe third country' as a legal concept is not entailed in the 1951 Refugee Convention of 1951, but it can indeed be deduced from the *travaux preparatoires* and literature. It follows that the STC concept is not intended to prevent refugees from crossing several countries before applying for asylum. They are granted a certain 'transit time'. In the literature, this has subsequently been described as 'without undue delay' and even more concretely via a period of 14 days 'stay'.[255]

252 The Asylum Procedure Regulation also still mentions the meaningful connection claim in (new) Article 45 on the safe third country concept.

253 CJEU, L.H. v. Hungary, C564-18, 19 March 2020: '[..] the obligation imposed on Member States by the EU legislature, for the purposes of applying the concept of 'safe third country', to lay down such rules could not be justified if the mere fact that the applicant for international protection transited through the third country concerned constituted a sufficient or significant connection for those purposes. If that were the case, those rules, along with the individual examination and the possibility for that applicant to challenge the existence of the connection for which those rules must make express provision, would be devoid of any purpose.' paragraph 49.

254 Karin Zwaan, *Veilig derde land. De exceptie van het veilig derde land in het Nederlandse asielrecht*, 2003; UNHCR, "Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting A/CONF.2/SR.35," 3 December 1951; Travaux III, p. 347.

255 Karin Zwaan, "*Veilig derde land*."

According to, non-binding but authoritative, UNHCR guidelines: '*Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State.*'[256]

The prevailing idea is that asylum should not be refused on the sole ground that protection could be granted in another state. The fear was that in that case there would be a risk that no state would take responsibility and that the refugee would be left in limbo, fundamentally undermining the idea of refugee protection. The idea arose that if an asylum seeker already has ties with another state before applying for asylum, it would be reasonable to refer the asylum seeker to that other state to apply for asylum.[257] Herewith States must consider the duration and nature of the asylum seeker's stay in other countries.[258]

Under current applicable EU legislation, a transfer to another country for the purpose of assessing a protection claim without meaningful link to that specific country would be unlawful. The Dutch government has tried, together with like-minded countries, to exclude the connection criterium from the new provision 45 on STC concept in tzsdhe Asylum Procedures Regulation to broaden the possibilities for future outsourcing schemes. However, as France and Germany opposed, the criterium remains applicable.[259]

256 UNHCR, "ExCom-Conclusion No. 15," sub h(iv), 1979.

257 Myrthe Wijnkoop, "Zoeken, genieten en/of garanderen. Het recht op asiel nader beschouwd," *A&MR*, 2013(7). This conclusion did not come out of nowhere, but stems from the negotiations that have been conducted in the years leading up to a Convention on Territorial Asylum. A convention that, in addition to the Refugee Convention, should say something about the granting of asylum, the determination of status and the allocation of responsibility. However, this treaty was never concluded.

258 As implicitly follows from the legislative history of Article 31 of the Refugee Convention. See also UNHCR, "A/AC.96/660, Note on International Protection 1985," sub 13.

259 European Council Conclusions, "Amended proposal for a Regulation of the European Parliament and of the Council," 13 June 2023.

Next to the 'meaningful connection', the third country must also be considered 'safe'.[260] This means in short that the non-refoulement principle and other human rights are respected, that there is access to an asylum procedure, and that if a permit is granted, protection is offered according to international legal standards.[261]

STC in the Dutch national asylum system

Article 33 of the APD has been implemented in the Netherlands Aliens Act by means of Article 30a(1)(c): an asylum application is declared inadmissible if a third country is considered to be a safe third country for the asylum seeker. This ground for rejection is further elaborated in regulations. Article 3.106a(2) of the Aliens Decree states that the application is to be declared inadmissible only if the asylum seeker has such a connection with the third country concerned that it would be reasonable for him to go to that country. There is no list of safe third countries. The decision-making authority decides on a case-by-case

260 See in this context also the preliminary questions by the Greek Council of State to the CJEU on the assessment of the STC principle. Greek Council of State, ruling 177/2023, 3 February 2023. See also Refugee Support Aegean Press release, "Greek Council of State: Preliminary questions regarding Turkey as a safe third country," 6 February 2023.

261 Current Article 38 (1) APD: Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned: (a)life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e)the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention. Newly proposed article 45 significantly alters this last paragraph in the sense that its lowers the standard of protection that may be expected in the particular country, namely to: 'the possibility exists to receive protection in accordance with the substantive standards of the Geneva Convention or sufficient protection as referred to in Article 44(2), as appropriate.' It does however complement the article with reference to the sources on the basis of which a country may be designated 'safe': The assessment of whether a third country may be designated as a safe third country in accordance with this Regulation shall be based on a range of sources of information, including in particular information from Member States, the European Union Agency for Asylum, the European External Action Service, the United Nations High Commissioner for Refugees, the Council of Europe and other relevant organizations.'

individual basis whether a country is a safe third country for the specific asylum seeker, and this must be done in a thorough manner.

This also follows from paragraph C2/6.3 of the Aliens Circular: it is the task of the IND to investigate whether there is such a link. The IND must consider certain sources of information about the general situation in a particular country in its assessment and must also provide insight into the investigation carried out and motivate the conclusion.

In assessing whether there is a connection, all relevant facts and circumstances shall be considered, including the nature, duration, and circumstances of the previous stay. The presence of a safe third country link shall in any case be presumed in cases where the asylum seeker has a spouse or partner of the nationality of the third country, or where there is a first-line or immediate family living in that country with whom the asylum seeker is still in contact, or in the case that the asylum seeker has previously resided in the country. The assessment is based on the combination of these factors: their weighting is set out in further operational guidance rules.[262] The mere transit through the third country is generally insufficient to establish a link unless there are other factors on the basis of which that link can be assumed.

In the absence of other factors based on which a link can be assumed, previous residence in the third country will generally have to have been at least six months, considering the circumstances of the person's stay in the third country. This is not an exhaustive list, so other circumstances that lead to the adoption of a bond are conceivable. If such situations arise, it will be necessary to provide individual justification for the establishment of a link.

Judgments of the Administrative Jurisdiction Division of the Council of State, the highest national court that adjudicates on asylum cases, have provided a more detailed explanation and application of the legislation

262 IND, "Beoordeling veilige derde landen in de asielprocedure – bewijslast en landeninformatie," IB 2021/8.

and regulations on the safe third country exception:[263] the three most important conditions are the connection criterion, admission to the country and the security and human rights situation.

The connection criterion is the first to be assessed. After all, if there is no meaningful link, the application can be rejected on that ground as the other conditions are no longer relevant. The case law mainly concerns the so-called 'reasonableness test': under what circumstances is the connection with the third country such that it would be reasonable for the asylum seeker to go to that country. Landmark case law states: "The scope of the reasonableness test, as described above, includes a duty on the State Secretary to properly substantiate that it is reasonable to expect a foreign national to travel to a safe third country and apply for asylum there, taking into account all the individual circumstances relevant to the assessment of the link that a foreign national has with the security invoked against him. In this case, this includes the circumstance that, unlike during the period of residence of the foreign national in the safe third country, as invoked by the State Secretary, the family of the foreign national is no longer present there.

Contrary to what the District Court considered, the fact that this circumstance also affects the foreign national's interest in pursuing her family life in the Netherlands is not sufficient to exclude that circumstance altogether in the context of the test of reasonableness."[264]

Practical issues

There are several practical or operational obstacles mentioned in numerous comments on the various externalisation proposals. First on the location where an external processing centre would be established, the 'partner' state where the asylum seekers would be transferred to. From a practical point of view, these should be countries capable of hosting extensive amounts of asylum seekers, and to a certain extent having a comparable level of living conditions for such a centre to be accepted by the hosting community. The concept of asylum

263 Council of State, ECLI:NL:RVS:2017:3378, 13 december 2017. See also ECLI:NL:RVS:2017:3379, 9 November 2016, ECLI:NL:RVS:2017:3380, 13 December 2017 and ECLI:NL:RVS:2017:3381, 13 December 2017.

264 Council of State, ECLI:NL:RVS:2021:2124, 21 January 2021, para 2.3.

externalisation raises questions relating to the possible 'pull-factor' of both local communities and of other migrants from neighbouring countries, including the risk of such centres becoming attractive hubs for smuggling and trafficking networks to offer their services to those whose application is rejected. Access to the location is thus also something which should be thoroughly considered, as it may also take different forms, depending on the specifics of the scheme. Is the centre only accessible for asylum seekers transferred from the EU? Or also directly (issue of numbers and pull factor)? What are the conditions of the transfer? Which rules apply? How to deal with particular vulnerable groups? As a preliminary assessment of the asylum seekers situation is a pre-condition following the non-refoulement principle, how to deal with persons clearly having no right to international protection?

An agreement with a third country is thus an important pre-condition. Secondly several other (practical) questions deal with the operationalisation of the asylum procedure, such as:

- Reception/accommodation of asylum seekers in the external processing centre. Bearing in mind the situation that the asylum seekers have been transferred from EU territory, the reception conditions should be equivalent to those in the EU, thus at least the minimum standards of EU law should govern the conditions of the facilities. Who will pay for those centres? Are these open centres, as detention is considered an *ultimum remedium*? How to deal with possible pull-effects for local residents and/or other migrants?
- Procedural aspects: the (legal) infrastructure of an asylum procedure must be in place, including trained staff, legal aid, translators, legal remedies, courts etc. Who will provide for this capacity? Who is responsible for quality control?
- Arrangements should be in place following the outcome of the procedure: what will happen with the persons granted international protection? Will they be resettled to the EU/Member states, will they reside and integrate in the host country? Will there be a distribution key? And what will happen with asylum seekers whose application was rejected? As the situation of return is something we all know too well entails many legal and practical challenges.

Principled/ethical arguments

One of the most principled arguments used in the 'external asylum processing' is the argument of shifting responsibility of 'western' states to the regions of origin who already bear the largest burden of refugee protection (and often are low-income countries), and/or have to deal with irregular (mixed) migration themselves. In other words, the denial of the legal responsibility of EU Member

States for persons in need of protection, thereby limiting global protection space. States pushing for externalisation often lose sight of the fact that a good sense of solidarity, not only in words but in deeds, is also in their self-interest.[265] Notwithstanding the current position by the Rwandese government:[266] the absence of serious and substantial dialogue with the third countries where EU States suggested to locate processing centres has not helped. See for example the sharp response of the African Union on the Danish outsourcing plans (discussed in paragraph 3).

265 Monika Sie Dhian Ho and Myrthe Wijnkoop, "Instrumentalization of Migration."
266 Monika Sie Dhian Ho and Francesco Mascini, "Dealen met Rwanda," October 2023.

6 Return in the context of migration cooperation

Voluntary return

After a definitive rejection of the asylum application, assisted voluntary return is the preferable return option.[267] The rejected asylum seekers have 28 days to leave the territory.[268] During that period, the rejected asylum seekers still receive financial support and can remain in the reception facility. Return preparations and counselling is supported by COA, the Return and Departure Service (DT&V) and the International Organization for Migration (IOM).[269] IOM is a partner for the Dutch Government regarding voluntary returns. Through its assisted voluntary return project (AVRR), under certain conditions, IOM offers organisational, financial and reintegration support.[270] Additional supplementary assistance is offered through the Return and Reintegration Regulation (HRT), through which adults are, for example, offered € 1,750 as a reintegration contribution.[271] If countries of origin do not cooperate, e.g. by refusing to issue necessary travel documents, the rejected asylum seeker can submit a request for mediation support through the DT&V.[272] The DT&V can subsequentially advise the IND to issue a 'no-fault' permit, allowing the person to stay longer in the Netherlands.[273] Up until August 2023, 15,800 rejected asylum seekers departed the Netherlands. Of these departures, 31% left on their own accord.[274]

267 European Migration Network, "Returning rejected asylum seekers: policy and practices in the Netherlands," May 2017, p. 26.
268 IND, "Terugkeerbesluit," 1 November 2023.
269 DT&V, "Leidraad Terugkeer en Vertrek."
270 IOM, "Voluntary Return and Reintegration Assistance from the Netherlands," 2021.
271 European Migration Network, "Returning rejected asylum seekers: policy and practices in the Netherlands," May 2017.
272 DT&V, "Hulp van DT&V."
273 Central Government Information, "Wat gebeurt er met afgewezen asielzoekers?," accessed 19 October 2023.
274 Central Government Information, "Kerncijfers Asiel en Migratie Augustus 2023," Augustus 2023, p. 6.

Forced return

When rejected asylum seekers do not leave voluntarily within 28 days, the DT&V initiates a process of forced return. Various measures are implemented to 'motivate' the asylum seeker to indeed cooperate with return. First, these rejected asylum seekers are placed in so-called 'freedom-restricting centres' (VBL) with a duty to report.[275] The maximum permitted stay at a VBL location is 12 weeks. Additionally, a Government issued security deposit can be imposed that will only be given back upon departure.[276] Additionally, freedom-restricting measures can be imposed, with those deemed to risk evading supervision placed in detention centres in Zeist, Rotterdam, or Schiphol airport as a last resort measure to ensure the rejected asylum seeker is readily available for forced return. The maximum period of allowed detention is 18 months.[277] Challenges regarding forced returns include the lack of cooperation of the countries of origin, the concealing of identity or obstruction of travel documents.[278] The actual forced return is mostly operationalised through (sometimes assisted) flights. There has been a trend of increasing cooperation with the EU, supported organisationally and financially by Frontex.[279] In 2022, 570 cases of forced return were documented.[280]

While undocumented migrants residing in the Netherlands remain a salient issue, the Dutch government reported a downwards trend in 2020. The latest reported estimate of the number of migrants staying in the Netherland without legal permission was between 23,000 and 58,000 in the period 2017-2018.[281] In an attempt to combat the consequences of undocumented stay on a local level, the government launched the pilot project 'the National Aliens Facility' ('*Landelijke Vreemdelingen Voorzieningen*', LVV) in 2019 together with the Association of Netherlands Municipalities (VNG). The aim of this cooperation agreement was to achieve permanent and durable solutions for undocumented migrants without the right of residency in the Netherlands, with a strong emphasis on return. 2065 migrants participated in the pilot project which ended in 2022.

275 DT&V, "Pre-departure accommodation."

276 European Migration Network, Returning rejected asylum seekers: policy and practices in the Netherlands," May 2017, p. 28.

277 DT&V, "Vreemdelingenbewaring."

278 European Migration Network, Returning rejected asylum seekers: policy and practices in the Netherlands," May 2017, p. 28.

279 DT&V, "Gedwongen Terugkeer."

280 European Migration Network, *Migration and asylum in the Netherlands*, August 2023, p. 58.

281 Central Government Information, "Estimates of numbers of illegal immigrants show downwards trend," December 2020.

The final evaluation concluded that durable solutions were found for 18% of the participants; a residence permit was granted anyway, the independent return was assisted to their country of origin, or there was onward migration to another country.[282] In May 2023, State Secretary van der Burg announced that the LVV will be expanded to a nationwide network in continued cooperation with various municipalities.[283]

Return agreements

In 2021, in partnership with IOM, the MFA launched the project 'Cooperation on Migration and Partnerships for Sustainable Solutions initiative (COMPASS) – a global initiative in cooperation with 12 countries: Afghanistan, Chad, Egypt, Ethiopia, Iraq, Lebanon, Libya, Mali, Morocco, Niger, Nigeria, and Tunisia. The focus of the project is facilitating voluntary returns in a sustainable manner, as well as combatting human trafficking.[284]

On the EU-level, the Netherlands is a part of the European Return and Reintegration Network (ERRIN), through which support is given for sustainable reintegration in the country of origin.[285]

The government is in dialogue with various origin- and transit-countries to build broad migration partnerships, also to encourage and manage returns.[286] The aim of these partnerships is establishing cooperation for returns, as well as border management, countering human trafficking, protecting vulnerable migrants, and creating pathways for regular migration. Current dialogue countries include Egypt, Morocco, and Nigeria.[287] Morocco has, for example, aided the Dutch authorities in determining the nationality of Moroccan nationals.[288]

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282 WODC, "Pilot Landelijke Vreemdelingenvoorzieningen vond voor 18% van deelnemende migranten 'bestendige' oplossing," November 2022.

283 Ministry of Justice and Security, "Kamerbrief over Landelijke Vreemdelingen Voorziening," 9 May 2023.

284 EMN, "The Netherlands 2021," August 2022.

285 DT&V, "Mogelijke ondersteuning bij vertrek."

286 See also various reports of the Advisory Council on Migration on this issue, recently in *Realism about Numerical Targets, exploring immigration targets and quotas in Dutch policy*, December 2022, p. 153.

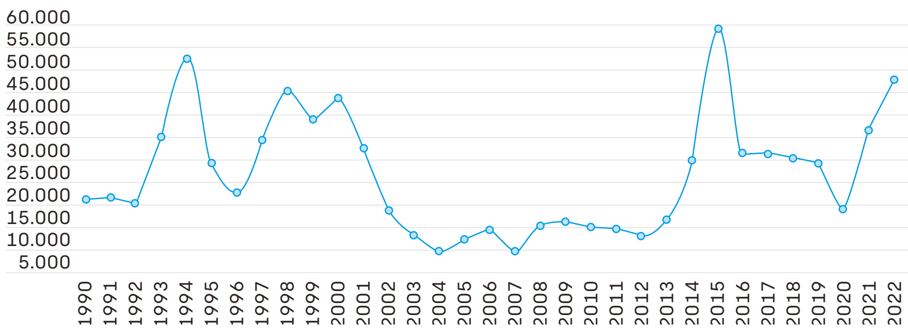
287 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 22.

288 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 27.

7 Statistics

Migration is the main cause of population growth in the Netherlands with a net migration of 223,789 in 2022. Asylum migration however accounted in the period 2013-2022 for only 11% of migrants entering the country.[289] From a demographic perspective the importance of asylum is however more substantial than these 11% suggest, since asylum migrants tend to stay longer in the Netherlands than labour or study migrants. A further 6% fell under the temporary protection scheme for Ukrainians. Asylum applications in the Netherlands make up 4% of the total number of asylum applications in the EU in 2022.[290]

Total number of asylum applications 1990-2022, Source: Vluchtelingenwerk Nederland[291]



In 2022 there were 35,535 first time applicants, with a 12,8% rejection rate. A majority was granted refugee protection (53,1%) followed by subsidiary protection (29%) and forms of humanitarian protection (5,1%). By far most applicants were from Syria (12,648, 36 %), followed by Afghanistan (2,732, 8%), Turkey (2,648, 8%) and Yemen (2,428, 7%). This order remained the same when including family reunification numbers.[292] Unaccompanied minors made up 12% of the applicants, mostly coming from Syria (58%) and Eritrea (14%).[293]

289 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 12.

290 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 11.

291 This is the total amount of first and subsequent applications, with family reunification numbers included in the total amount: DCfR, "Bescherming in Nederland: Asielverzoeken in cijfers."

292 AIDA, *The Netherlands*, 2023, p. 8.

293 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 12.

35% of asylum seekers arriving between September 2022 and August 2023 were from Syria. Other main countries of origin are Turkey (7%), Yemen (6%), Eritrea (5%), and Somalia (5%).[294] Currently, more than 100.000 displaced Ukrainians are residing in the Netherlands under the Temporary Protection Directive that are not included in the general numbers for asylum.[295]

Eligibility rates have increased up to 69%.[296] This comes at a time when the number of first-time asylum applications in 2022 is highest since 2015, with 35,540 applications. This is an increase of 44% compared to 2021,[297] with the lowest number in 2020 at 13,670 first time applicants due to Covid-19.

Asylum applications in the Netherlands

Year	Total	First	Decisions	Granted
2019	31.340	22.530	18.190	25%
2020	19.610	13.670	17.350	49%
2021	37.150	24.690	19.910	59%
2022	49.420	35.540	23.890	78%

About 80% of first-time applicants have been assessed under the Track 4 procedure, 17% under the Dublin-track (Track 2), and 3% under the Safe country-track (Track 1).

Due to the lack of housing available to persons granted protection, the outflow from reception facilities has been hampered. This led to a 41% increase of occupancy of reception facilities in 2022 compared to 2021.[298] In 2022 people stayed in COA reception facilities for an average of 10,41 months.

294 Central Government Information, "Rijksoverheid Kerncijfers asiel en migratie," Augustus 2023

295 Central Government Information, "Cijfers opvang vluchtelingen uit Oekraïne in Nederland," accessed December 2023.

296 According to EU definitions, in which Dublin referrals are not included in the rejections, this number is 87%.

297 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 80.

298 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 84.

In 2022, 10,930 applications for family reunification were granted,[299] 19,230 migrants without a valid permit left the Netherlands, of which 58% with a known destination. Of this group 2,930 were forcibly returned to leave.[300] 64% of the registered departures go back to their country of origin, 23% to another member state under Dublin, and 14% to other third countries.[301] It is estimated that between 23,000 and 58,000 people in the Netherlands reside illegally. This would mean a substantial decrease in the last decade.[302]

The Ministry of Justice and Security's 2023 'multi-year production forecast' projected that, under a moderate scenario, the Netherlands would receive a combined total of 67,000 asylum seekers (comprising asylum applications and family reunification), with a high-end estimate suggesting this number could reach 77,000.[303] Thus far in 2023 (until September 2023), there has been a total of 33,615 asylum applications (including first and repeat) in the Netherlands.[304] The influx of family reunification is at 7,129 persons. Given the 2023 figures thus far, UNHCR concluded that both the moderate and high-end estimate seems highly unlikely. The low-end projection of 49,000 seems to be the more accurate prediction.[305]

299 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 84.

300 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 112.

301 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 113.

302 This research was based on the period 2017-2018: Central Government Information, "Dalende trend zichtbaar in illegalenschattingen," 16 December 2020.

303 Ministry of Justice and Security, "Meerjaren Productie Prognose (MPP) 2023-1."

304 IND, "Asylum Trends – Monthly report on asylum applications in the Netherlands," September 2023, p. 4.

305 UNHCR, "Waar of niet waar: 'In 2023 komen er 67.000 asielzoekers naar Nederland," 20 July 2023.

Conclusion

Article 18 of the European Charter of Fundamental Rights, a source of primary EU law, states: '*the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.*'

EU Member States, such as the Netherlands, shall guarantee the right to asylum within the boundaries of the abovementioned legal framework. The right to asylum, which is at the absolute minimum an assessment of the asylum claim, thus constitutes a legal obligation. Given the content of that legal framework, this refers to territorial asylum (procedures), or at least it does not allow exclusive operationalisation of asylum protection extra-territorially.

The Netherlands has, at least on paper, a well-considered and functioning asylum system. Important features are, amongst others, the centralised registration process, the focus on and investments in the initial phase of the procedure including the RVT, NGO information, legal aid, case management, and the single status system. The current crisis mode has little to do with the set-up of the national asylum system in general, but rather with decision making on budget cuts and capacity policy. Beyond reception shortages and backlogs, the central issues in the Dutch political and public migration debate revolve around questions and concerns related to the volatile nature of asylum, particularly the recent increase in asylum applications. The broadly shared sense of insufficient national and European control over (asylum) migration is further reinforced by the practice of mixed migration. Alongside with the experienced pressure on the welfare state and the perceived legal complexity of the national procedure exacerbated by the impact of the European judiciary, these factors give rise to both societal and political concerns.

Several policy options or solutions regularly surface in the political debate. First, the relevance and role of the 1951 Refugee Convention in asylum policy has repeatedly been questioned. In 2021, a preliminary study was published on the question whether, and if so how, the Refugee Convention should be adapted in order to provide for a sustainable legal framework to deal with contemporary challenges with respect to (access to) asylum. The conclusion was that the

Convention is dated, but not outdated. Changing the Convention would not be the key for effectively dealing with contemporary asylum challenges, this rather lies with EU law and European cooperation which is more detailed and binding for the Dutch government.

Another issue is whether working with quota/caps/numerical targets, or ending territorial asylum all together, would be a solution in taking back control of migration. The Dutch Advisory Council on Migration concluded last year that the international legal framework does not allow for rigid caps on asylum protection, but rather referred to the various direct and indirect mechanisms to steer and control asylum migration. One element of increasingly controlling migration would be to make more use of regulated legal pathways such as resettlement (the Netherlands has a rather modest yearly quota of 500 per year) and labour migration (the Netherlands only applies those routes for highly skilled labour).

The third focus in current discussions concerns externalisation of asylum procedures, which again has entered the national political debate through several parliamentary motions dealing with various 'models': from exclusively processing in countries outside the EU, to applying the STC concept through a new deal, to broader migration partnerships including asylum protection cooperation. These models however raise many legal and practical questions which are partly untested yet. What is in fact clear is that in case of (exclusive) extraterritorial processing or the transfer of persons with no prior 'connection' to the country to which they are sent as part of the migration partnership, will require changes in EU law, and likely also in national legislation of the Member States concerned. This may well feed into the present idea within the current political and public debate that the international and European legal framework is 'standing in the way' of effectively dealing with asylum.

This is not the case per se. The Netherlands applies some more favourable standards than required by EU asylum acquis (such as legal representation throughout the procedure, the single status system and the chosen duration of the temporary permit), which means the Netherlands still has legal room for manoeuvre. However, it is relevant to state that these standards are carefully considered and well-thought parts of the national asylum system. They are implemented precisely for reasons of efficiency and effectiveness of the procedure. There is no empirical evidence that they attract (more) asylum seekers, while withdrawing them from the system would indeed lead to more legal proceedings and heavier burden on the operation of the system.

In order to get out of the crisis mode and to regain control over the functioning of the asylum system, it follows from the analysis that (further) investments in the initial phase of the procedure, sufficient processing capacity and quality of decision-making, and simplifying rather than complicating policy rules and procedures are necessary. The system as put forward after the first evaluation of the Aliens Act 2000 (PIVA) provides for a solid system. Furthermore, valuable lessons can be drawn from the distinctions between the protection scheme applied to Ukrainian displaced persons and asylum seekers, such as the non-application of the Dublin rules and the immediate access to the labour market.

European and international cooperation is inevitable and indispensable to effectively deal with asylum migration, allocate responsibilities, and provide solid protection. The external dimension of EU asylum policy is an undeniable part of the process for better and more workable solutions. The Netherlands has always been a frontrunner, and should remain so, in strengthening protection capacity in the region. Meanwhile, it is the reality that both old and new ideas and models for providing asylum outside the EU are actively discussed and put on the table.

However, the analysis of externalisation in an EU (law) context in this report, indicates that the introduction of external processing will not mean that national procedures and reception facilities in the member states, i.e. territorial asylum, can be completely abolished, as the principle of non-refoulement would prohibit that. There is no empirical evidence (yet) in the European context that externalisation has a substantial deterrent effect to those not in need of protection or to those who can find protection elsewhere. And, as we have seen with the EU-Turkey deal, migration partnerships which include asylum protection schemes may also lead to the risk of instrumentalization of migration.

What would then be necessary (basic red lines) to provide a model of externalisation, complementary to at least some form of asylum claims assessment on EU territory? First, as current EU (and national) law does not allow for the transfer of an asylum seeker to a location outside the EU: the legislation, including EU primary law, needs to be changed amongst others to clarify competencies, uplift the territorial scope of the acquis and deal with the connection clause. Thorough scrutiny is necessary of the human rights and refugee protection track-record of the possible partner country, also in relation to possible legal responsibility for violations of international obligations by that state. And any attempt should be combined with sufficient financial means and burden sharing in the form of resettlement and legal pathways.

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